SUPREME COURT, U. S.

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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 174

CLYDE FRANKLIN LEE, ET AL., PETITIONERS,

vs.

FLORIDA.

ON WRIT OF CERTIORARI FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED MAY 19, 1967

CERTIORARI GRANTED JANUARY 15 1968

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Q. Deputy sheriff of what?

A. Orange County, Florida.

Q. At the time that you went there did you have anything in your possession?

A. Yes, sir; I had a state search warrant.

Q. Deputy Tanner, I have an article here that I would like you to examine if you would, sir?

A. (Witness complying.)

Q. Deputy Tanner, upon your examination of the article that I've just handed you are you able to identify it?

A. Yes, sir; this is a search warrant I had in my possession at 411 Manor Road.

MR. RUSS: Your Honor, at this time I request that the article be marked for Identification as Court' Exhbit Number Seven.

THE COURT: All right, mark it for Identification as Court's Exhibit Number Seven.

(The above instrument referred to was thereupon received by the Judge and marked as Court's Exhibit Number Seven for Identification.)

BY MR. RUSS:

Q. Deputy Tanner would you tell the jury what you did upon your arrival at the house at 411 Manor

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Q. Who was it sent to?

A. I don't recall.

Q. You don't remember?

A. Not for sure I don't.

Q. Well, let me ask you how many telephones does the sheriff's office put into houses of other people so they can listen in to conversations of other people?

MR. RUSS: Objection, Your Honor.

THE COURT: I am going to overrule it.

THE WITNESS: I don't know what name I used, Mr. Kirkland.

BY MR. KIRKLAND:

Q. You don't remember what name you used with them?

A. To get the service installed if I was the one that done it or if I just called, I don't remember, All I paid for or all the sheriff paid for was having a telephone installed at 211 Manor Road and for the installation charge and for nothing else.

Q. And in whose name was it installed?

A. I don't recall.

Q. Did you use an alias, Mr. Tanner?

A. I could have; yes, sir.

Q. And you don't remember?

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A. No, sir.

Q. Do you know who if anyone did rent it?

A. Who? No, sir.

Q. You were never present in it?

A. No, sir. I was not.

Q. Was the purpose of installing the telephone at 211 Manor Road to listen to conversation of a person other than persons who occupied 211 Manor Road?

MR. RUSS: Your Honor, I am going to object to that, there has been no testimony there has been a phone installed at 211 Manor Road to the knowledge of this witness, as I understand this witness said he never was in the house at 211 Manor Road.

THE COURT: He also testified he may have installed it. I am going to let him answer the question.

THE WITNESS: What was it again?

BY MR. KIRKLAND:

Q. Was the purpose of installing the phone at 211 Manor Road to eavedrop or listen in to the conversations of the party located at 411 Manor Road?

A. Well, again, assuming that I did, I could have but I don't know, I would say that that would be

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the purpose; yes, sir.

Q. In other words it was something more than coincidence that this line happened to be a line in a party line with 411 Manor Road?

A. Beg your pardon?

Q. It was something more than a coincidence that the line that was installed was something more than a coincidence with the party line at 411 Manor Road?

A. Yes, we didn't install it for the fun of it.

Q. Yes, for the purpose of listening in on the other party. Did you ever listen on the telephone?

A. No, sir.

Q. Is that out of the city of Orlando, Florida?

A. Yes, sir; I believe it is in Maitland.

Q. Let me just ask you this very briefly, as far as authority and all that is concerned did you authorize or direct a Mr. Horner of the Orlando Police Department to use that phone at 211 Manor Drive?

A. I ———

MR. RUSS: Just a minute, I am going to object until there has been some establishment as to the existence of the phone that he is making reference to.

MR. KIRKLAND: If the State will submit

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instrument and get a cheaper rate and it is easier on us, it is quicker, and it is easier for the people putting in a telephone.

Q. You say you have a work order, I have an exhibit marked State exhibit 21a for identification, would you examine it, please?

A. (Witness complying)

Q. Are you able to identify that article?

A. Yes, it is a service order.

Q. Which service order?

A. It is the service order I used the day that I installed the telephone I saw, it says it has got my initials and everything on it and it is my handwriting.

Q. Could you tell us exactly where it was when you hooked up the line to the pole?

A. By looking at this order I can tell it was worked out of the front of 410 cable, tier 751 showed up on binding post 9 in that particular terminal.

Q. Can you tell us as regards the installation that you made at that house on the 19th of July what type service you installed there?

A. By looking at this order I installed an R-4 line, that is a residence 4 line.

Q. What do you mean by a residence 4 line?

A. Well, if it was a business line it would be a B-4 for

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a business and a R is a residence phone, that is for home use.

Q. What does the 4 signify?

A. It is a party four line, there can be up to four people on it.

Q. It is possible to put four parties on that line?

A. Yes.

Q. At the time that you were at the house at 411 Manor Road with the man whom we have identified as Clyde Lee did you have any conversation with him concerning the service you were installing?

A. Well, I, it was early in the morning and I probably had very little conversation with him other than to tell him that it was a R-4 instead of an R-1 line.

MR. KIRKLAND: If the Court please, we object to that, the answer is yes or no. We object to any conversation.

THE COURT: Objection sustained. Just answer the question as asked.

BY MR. RUSS:

Q. Did you have a conversation with Mr. Lee at that time and place?

A. Yes.

Q. Tell the jury what you told Mr. Lee and what he told you?

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always tell them such, that they are on a four party line and there are not facilities for a private line.

Q. Did you tell this in this particular instance?

A. Yes, I do this all the time.

MR. KIRKLAND: I object as not being responsive. He said he tells that to all of them.

THE COURT: Objection sustained. Just answer the question.

BY MR. RUSS:

Q. Mr. Wheaton, what we would like to know, rather than talking about all your customers, we would like to know on July 19th at 411 Manor Road you told Mr. Lee he was on a four party line?

A. Yes.

MR. RUSS: Your Honor, at this time I would offer this installation record into evidence as 21a.

MR. KIRKLAND: As to the defendant Clyde Lee.

THE COURT: Are you offering it as to all the defendants or only as to the defendant Clyde Lee?

MR. RUSS: At this time only as to Lee, your Honor.

MR. KIRKLAND: May I inquire briefly?

(Whereupon Mr. Kirkland conducted voir dire examination.)

BY MR. KIRKLAND:

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Q. Mr. Wheaton you have a present recollection today of stating to Mr. Lee, of stating to Mr. Lee on July the —

A. It is on the top, July 19th.

Q. That you were installing at that address a four party line?

A. I have no tape or no record of this but I feel sure and I always do that, I have told him that he was on a four party line, I always tell them.

Q. How about in those cases you go there and the owner is not there, there is a maid, do you tell the maid?

A. I always tell the maid that is there.

Q. Do you recall on July 19th that you told Mr. Lee this on that date or do you assume that you did because you always tell everybody?

MR. RUSS: Judge, two questions there.

THE COURT: Objection overruled. Answer the question.

THE WITNESS: Well, there again I have no tape of this that I'm, I say that I told him you can say that I presume that I told him if you want.

BY MR. KIRKLAND:

Q. Is this why a party orders a private line that you tell them this?

A. Well, no, not particularly if he had ordered a two

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party line and there was not facilities and I gave him a four then I would have told him that also.

Q. Then as far as you know the order was placed for a private line?

A. Yes, that is what it says on the order, R-1, that is a private line.

Q. Then as far as the record is concerned it shows that the defendant Lee ordered a private line, this is what he ordered?

A. Yes, it shows that a private line was ordered.

Q. And you don't have any present recollection with memory refreshed what you told him, this particular person, anything other than that?

MR. RUSS: Your Honor, I object to that, this witness has testified in answer to at least three questions that he did tell Lee he was on a party line.

THE COURT: I can't agree with you, the objection is overruled. Answer the question.

THE WITNESS: Repeat the question, please.

BY MR. KIRKLAND:

Q. Do you have a present recollection, that is, here today of the converation that you had with Mr. Lee on July 19, 1963?

A. Of the whole conversation?

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Q. Yes, sir.

A. I cannot remember every word that was said, no.

Q. Do you have a present recollection, with memory refreshed that you told Mr. Lee on that occasion during that conversation, the tenor of which was that despite what he ordered you had to give him a four party line because nothing else was available, do you have a present recollection of saying that?

A. I, I——

Q. Just answer yes or no, sir, if you can and then you can explain.

A. I'll say yes that I have a recollection of telling him this because, as I go back through my mind I can remember pretty nearly every move I made that morning from what he was dressed in on down.

Q. How many telephones did you install that day?

A. Oh, I will say five or six.

Q. Where else did you install them on July 19th?

A. I can't say the exact date.

Q. I told you the exact date, I asked you where else did you install on that date?

MR. RUSS: Your Honor, I object to this, we are going to the admissibility of exhibit 21.

MR. KIRKLAND: I will object to this at this time as to the defendant Lee but I will cross examine him.

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THE COURT: State's exhibit 21 will be received in evidence as State's exhibit 21.

MR. RUSS: 21a, Your Honor.

THE COURT: 21a in the case of the State of Florida versus the defendant Lee only.

BY MR. RUSS: (continuing direct examination.)

Q. Mr. Wheaton, would you tell us whether or not after you installed the number at 644-3780, you installed the service there were you checked it out?

A. Yes, I checked in two different ways.

Q. Would you tell us how you checked it out on the 19th of July?

A. It has got to be checked out always to make sure it is on the right line, we evert, we dial the number up on the telephone, we get a recording on our line less allowative time to be answered and then we hang the phone up, it rings itself.

Q. Did you do that on that morning?

A. Yes, sir; and at the same time we adjust the bell to the ring that the people ask us to, loud, softness.

Q. When you did this did you hear this recording?

A. Yes.

Q. Did you hang up?

A. Yes.

Q. What did you hear then?

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A. The bell on the telephone rang.

Q. Did you adjust the bell on the telephone?

A. Yes.

Q. In what other way did you check that the phone was properly installed?

A. I work with a dispatcher, I have to call every service order to him and we have him to call us back from an outside line to make sure that that phone rings.

Q. Did you do that in this particular instance?

A. Yes.

Q. Then what happened?

A. Then I talked to the dispatcher on the phone and to make sure that it rings too and I can hear him well.

Q. When the phone range did you hear the dispatcher well?

A. Yes.

Q. Did he appear to hear you well?

A. He said that he did.

MR. RUSS: I have no other questions.

CROSS EXAMINATION

BY MR. KIRKLAND:

Q. Mr. Wheaton, I want to call upon your excellent memory and ask you to give me the address of another phone that you installed on that day, the conversation that you had with the person there and what you told them?

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BY MR. RUSS:

Q. Mr. witness, would you please tell us what your name is?

A. Donald Brown.

Q. How do you spell your last name, Mr. Brown?

A. B-r-o-w-n.

Q. Would you tell us where you live, please?

A. Longwood.

Q. Do you have an address out there?

A. 250 Longwood, 250 Palmetto.

Q. What do you do for a living?

A. Work at the Winter Park Telephone Company.

Q. What do you do at the Winter Park Telephone Company?

A. I am an installation repair supervisor.

Q. Would you tell us what your job entails?

A. It entails insuring that all installations and repairs are maintained.

Q. Do you do some of that work yourself?

A. Sure.

Q. Mr. Brown, referring to the date of July 26, of 1963 did you have an occasion to go to a house at 221 Manor Road in Maitland, Florida?

A. Yes, sir; I did.

Q. When you went to that house would you tell the jury what you did, please?

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A. Well, I went there, I had a service order to install a telephone on a party line which I did.

Q. Do you recall where you installed that phone in that house?

A. Yes, sir; and there was a previous installation in that home when I installed the phone at that location.

Q. Was that telephone number 644-7040?

A. If that is what the order reads; yes, sir; with my initials if I can see it.

Q. I have an article here marked State exhibit 21b for identification (showing same to witness.) Is that a service order for that particular job?

A. Yes, sir.

Q. What was the telephone number you installed there?

A. I installed the number listed on this order?

Q. What is that, please?

A. That is 644-7040.

Q. Can you tell us how you went about installing it?

A. Yes, sir. I received this order and I went out to install the phone. I had a drop ran to a terminal predesignated on this information here and I do the order according to the assignment.

Q. Can you tell us where you hooked the wire up at the pole outside the house?

A. Right at the terminal on the, I by-passed the terminal

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in front of the house to the one on the corner of Live Oak and Manor Road.

Q. Can you identify that connection location for us?

A. Oh, yes.

Q. Would you do that, please?

A. Here you mean?

Q. (Mr. Russ nodding head.)

A. That is it.

Q. If you would just tell us where you hooked up that telephone to the pole?

A. On binding post three, it is a 10-tier termination.

Q. Can you tell us where this pole was that is what we are trying to get at?

A. The pole was on the corner of Live Oak and Manor Road.

Q. What was the installation location there on the pole?

A. On the pole?

Q. Yes.

A. It is about four and a half feet high on the terminal laying on the pole, that is on your drop wire to get access to your cable back to your central office equipment.

Q. Can you tell us where you made the installation on the pole referring to that service order?

A. On the pole?

Q. Yes, sir.

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A. All I did was tie the drop service going into the home on that pole, as I say, there is a 10-pier cable terminal of cable piers and I had predesignated pier on this order to tie my assignment to.

Q. Would you tell us that is, sir?

A. That is cable 26, pier 71, binding post 3.

Q. Did you make the installation at that location?

A. Yes.

Q. Did you receive that instruction to make that installation from your central office?

A. I received that from the assignment department.

Q. Who is the gentlemen in the assignment department?

A. The supervisor here is Mr. Martin Nold.

Q. N-o-l-d?

A. N-o-l-d.

Q. After you made the installation at the house at 221 Manor Road on the 26th of July of 1963, did you check the service?

A. Yes, sir.

Q. Would you tell the jury how you checked the service?

A. We checked the service by dialing the number which appears on your phone, you will get a report stating you have dialed a party on your line and it will ring back indicating you were on the proper line.

Q. Did you do that in this instance?

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A. I did that.

Q. Did you get a ring back?

A. Yes, sir.

Q. Did you get a recording?

A. Yes, sir.

Q. Which number?

A. 644-7040.

Q. Did you make any further requests?

A. I tested with the dispatcher and in turn he verified me.

Q. Would you tell us how you did that?

A. I called a dispatcher and had him to ring me back and I hung my phone up and he returned the call to me.

Q. Did you do that?

A. Yes, sir.

Q. Did the phone ring properly?

A. Yes, sir.

Q. This was after the phone had been hooked up?

A. Yes, sir.

MR. RUSS: Could I have just a moment, Your Honor?

THE COURT: All right.

MR. RUSS: Your Honor, at this time I would offer into evidence the exhibit 21b.

MR. KIRKLAND: As to what?

MR. RUSS: Let me ask one other question if I

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may, please.

BY MR. RUSS:

Q. I am sorry, Mr. Brown, I overlooked something. Can you tell us what type service you installed at that location on that day?

A. A residence-4.

Q. Would you tell the jury what you mean by a residence-4?

A. That means that it uses residence service and it is a four party line, there could possibly be four people on it.

Q. Four different numbers on that line?

A. Four different numbers on this line.

MR. RUSS: Your Honor, I would offer this subject to connecting it up very shortly.

MR. KIRKLAND: One or two questions.

CROSS EXAMINATION

BY MR. KIRKLAND:

Q. Mr. Brown, did you have a conversation with Mr. John A. Johnson?

A. No, sir.

Q. Sir?

A. John A. Johnson?

Q. Well, that was the person for whom you installed?

A. Well, I don't know if that was actually the person

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or not, I didn't know him by name, I knew him by sight.

Q. You have the work order here?

A. I have the work order.

Q. And you have been testifying from the work order?

A. Yes.

Q. And the work order shows you installed it for John A. Johnson, right?

A. John A. Johnson, I don't know if this was actually the man or the fictitious name used here, I don't know.

Q. You mean somebody lied to you about their name?

A. Oh, no, not to me.

Q. Well, who is John A. Johnson?

A. John A. Johnson?

Q. Yes, sir; the man you installed the phone for?

A. Unless he was the police officer there, I don't know who he is. I don't remember the names.

Q. Well, did you install a telephone at the house for somebody that you didn't know who it was?

A. We have many occasions to install phones for people with names that aren't there; yes, sir.

Q. But was there somebody here at the time?

A. Yes, sir.

Q. Was it John A. Johnson?

A. I don't really know.

Q. Did you have a conversation with a person there?

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A. Yes, sir.

Q. And did you tell the person there that you were sorry that you couldn't give him a party line, that you were going to have to put him on a party line?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Did you tell him that you were installing a party line phone?

A. Yes, sir.

Q. You did?

A. (Witness nodding head)

Q. What does R-4, FAC mean?

A. FAC means hand set, hand cradle. Fixed hand cradle.

Q. Let me ask you this, Mr. Brown, did you know at the time you installed this phone you were installing it for somebody using a fictitious name?

A. I didn't know about the fictitious name.

Q. When did you find out about that?

A. Well, I still don't know.

Q. Well, you said a few minutes ago that you didn't know whether it was a man or fictitious name; is it the purpose of the Winter Park Telephone Company to install telephones for persons desiring to listen in on other persons?

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MR. RUSS: Your Honor, I object.

MR. KIRKLAND: I think we should know what the policy is of the Winter Park Company.

THE COURT: Wait until the Court makes a ruling.

MR. KIRKLAND: I will withdraw the question on that.

THE COURT: It has been withdrawn.

BY MR. KIRKLAND:

Q. Did there seem to be something unusual about the installation of this phone, Mr. Brown?

MR. RUSS: To which I object until counsel gets specific.

THE COURT: I will overrule the objection.

THE WITNESS: Would you state it again please?

BY MR. KIRKLAND:

Q. Was there something unusual about the installation of this phone at this place?

A. Well, it was on an emergency basis as far as the information that I received.

Q. From whom did you receive the information?

A. From the commercial department.

Q. And the man or woman from whom you received it?

A. A Mr. Carl Galloway.

Q. Mr. Carl Galloway and what was that message?

MR. RUSS: I object to that as being hearsay,

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Your Honor.

MR. KIRKLAND: The State can object to hearsay.

MR. RUSS: Why not, we are a party to a law suit, the rules apply to the State of Florida as well as anybody else.

THE COURT: I am going to sustain the objection. Let's not go into conversations so far removed.

BY MR. KIRKLAND:

Q. Where on here does it appear there was some emergency?

A. It doesn't state that.

Q. So, then, you emergenced over to 221 Manor Road, right?

A. Yes, sir.

Q. What did you find when you arrived there?

A. There was two gentlemen there that let me have access to installing a phone.

Q. How were they dressed?

A. Normal dress.

Q. What conversation did you have with them at that time?

MR. RUSS: Once again, Your Honor, we have got a hearsay.

THE COURT: Objection overruled.

THE WITNESS: Just the normal conversation.

BY MR. KIRKLAND:

Q. What was that?

A. I explained that I was there to install a telephone

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service.

Q. Who did they identify themselves to you as being?

A. Like I say, I don't remember names, I don't go by names, I don't try to remember names. In business it is impossible. I mean, service orders as I handle and see in a day's course.

Q. And it is difficult for you to remember what you say to each person that you install a phone for?

A. Well, I would say.

Q. It would be very unusual for you to go back a year and a year and a half and name the person for whom you installed a phone?

A. It would, sure.

Q. Did it mean anything to you by observing on this work order—let me ask you this, what does CC—

A. Coiled cord.

Q. I am sorry?

A. Coiled cord, receiver cord.

Q. The word, the letters, initials CC followed by Orange Ct Sheriff Dept, Attention Bob Tanner, what does that mean?

A. That is handled on the commercial end which I am not fully acquainted with, that doesn't mean much to me.

Q. How about if it is followed by the word bill, b-i-l-l?

A. It still—

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Q. It wouldn't mean bill Tanner?

MR. RUSS: Your Honor, the witness—

MR. KIRKLAND: Let me refresh his memory.

THE WITNESS: I said—

MR. RUSS: Your Honor, the witness said he didn't know what it means.

THE COURT: Let him answer the question.

THE WITNESS: Not being familiar with the commercial end of it, like I was saying, I am acquainted only with the type service the telephone number and the lower portion for my end of the work. This other represents some meaning to other departments.

Q. And that—look at that, Mr. Brown, if you would and tell me if that means anything to you at all?

A. It indicates to that it would be to me as far as my knowledge of this department.

Q. As what?

A. That would be billed to this.

Q. What would be billed to who?

A. Bob Tanner.

Q. What would be?

A. The telephone bill.

Q. And where in care of?

A. The Orange County Sheriff's Department.

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MR. KIRKLAND: I see. No further questions and we object on the grounds that it is a purely self-serving sort of document which is no connection directly or remotely connected with these defendants.

THE COURT: It will be received in evidence subject to the materiality being shown.

MR. RUSS: I have no other questions of Mr. Brown, Your Honor.

THE COURT: Do you have any further question in cross examination of this witness?

BY MR. KIRKLAND:

Q. Did you return to the scene of the installation at any time?

A. During, any time, no.

Q. Within two or three weeks, a month?

A. (Witness shaking head.)

Q. Did you take the telephone out later on?

A. Yes, sir.

Q. Who was present at that time?

A. I don't, like I say, I don't remember the gentlemen's name.

Q. Have you seen him out here in the witness room?

A. Not here; no, sir. In the witness room?

Q. Yes, sir.

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A. Yes, sir.

Q. You talked with them and they identified themselves to you as being with the Orlando Police Department?

A. Yes.

Q. And what else have you discussed with them in the witness room?

A. Nothing.

Q. That is all?

A. Yes, sir.

Q. Just, 'I am Mr. Johnson of the Orlando Police Department, I am Mr. Brown of the Winter Park Telephone Company?'

A. Well, I state what I am there for to do, what it is they stated, that they were from the police department.

Q. And you stated to them what you were here for?

A. Yes, sir.

Q. What did you state to them that you were here for?

A. To install a telephone.

Q. I am talking about the witness room here in the last day?

A. Oh, no, I didn't say that.

Q. What did you state then?

A. Nothing.

Q. I thought you said in the witness room?

A. I thought you were referring back to the installation.

[566]

A. It wasn't on there.

Q. What was it on?

A. I installed the phone and it wasn't on there, I looked.

Q. What was it on?

A. I said I possibly could have seen, possibly could have been.

Q. It possibly could have been?

A. No, sir.

Q. If there was, there—

MR. RUSS: I object to Mr. Kirkland harassing this witness.

MR. KIRKLAND: Would you read the question back?

(Whereupon Mr. Kirkland's last question was read as follows: "If there was, there—")

THE WITNESS: Possibly it wasn't hooked to the equipment when I left, that is what I was trying to say.

BY MR. KIRKLAND:

Q. That is what I was trying to get at, Mr. Brown, just exactly what you are trying to say. You stated that you observed some electronic equipment at the scene of the installation, is that right?

A. It could have been that.

Q. Well, what did it look like, describe it to these gentlemen, if you will?

[569]

on the same pier and also tied to the same identical line equipment in the office which would make those two phones on the same line.

Q. When you say they are on the same line what do you mean?

A. I mean they are party line situations, both phones being on the same party line are using the same set of relays and common equipment.

Q. As regards the one dealing with 644-3780, 411 Manor Road, was that done by your department?

A. This was done by my department, yes. This particular order was done without my knowledge, it went through with a group of orders.

Q. Do you know about the date of that assignment?

A. The due date on the order was 7 slash 19 slash 63, this would probably be either assigned the day or at the most days of this time.

Q. As regards the second one, 21b, pertaining to the address of 221 Manor Road, Maitland, and the number 644-7040, did you make that assigment?

A. Yes, we did. My department made that assignment.

Q. Did you assign the line and it was the second catagory here?

A. This is the line, this is the particular cable, this is the particular pier, this is the address of the

[575]

orders a month and I believe at the time I am sure there was only four party vacancies existing.

Q. Was that in that particular neighborhood?

A. Yes, sir.

Q. All right.

A. And that this was put on one of the four party vacancies existing on this, on 7142 line.

Q. Do you know how many four party line vacancies were in existence about that time which would have been convenient and economical to hook to 221 Manor Road?

A. I feel that there was very very few because this is one of our older sections of town and usually the subscribers have private lines or there's already established four party lines that have been in for some time, if you will.

Q. Was there any private line service available on that particular area on Manor Road during that particular time?

A. No, sir.

Q. Was there any other four party vacancies that were more convenient and economical than the one that you assigned to 221 Manor Road on that occasion?

A. No, sir.

Q. Can you tell us whether or not you received any communication in connection with the assignment of

[577]

the service at 221 Manor Road?

A. I received a verbal request from the commercial department to try and put this phone on the same line with the one at 411 Manor Road.

Q. Was that an extra-ordinary request in the activities of your department?

A. No, sir; we get a lot of these requests or the opposite requests that they would like to be with some other subscriber or don't want to be with a certain subscriber, so

long as it is feasible within limits we try to service all these requests to our subscribers.

MR. RUSS: I have no further questions of Mr. Nold.

CROSS EXAMINATION

BY MR. KIRKLAND

Q. Mr. Nold, I understand from what you say that the installation of telephones upon the request of subscribers is governed by records and regulations and tariffs, is that correct?

A. That correct, sir.

Q. Part of the regulations of the telephone company are that you install the equipment available that is ordered by the subscriber, is that correct?

A. Yes, sir; as far as feasible, sir.

Q. As far as possible even—

[578]

central office or somewhere out along the cable line?

A. Out along the cable line.

Q. Now, where in reference to 411 Manor Road?

A. It would have been a long 17-92 down towards the central office, between that location and the central office.

Q. In point of feet or miles how far would that be?

A. To the best of my knowledge, sir, it would have been about a half to a quarter of a mile that another splice ran.

Q. About another quarter of a mile, perhaps?

A. Yes, sir.

Q. And you say that it was more coincidence than design that the telephone installed at 211 Manor Road was connected to the party line at 411 Manor Road?

A. Yes, sir.

Q. Purely coincidental, it just so happened that that line was available and somebody ordered that line and it was pure coincidence that it ended up on the party line at 644-7040?

A. Yes, sir, but I had a request.

Q. Who requested it?

A. Commercial.

Q. Who was it?

A. Mr. Galloway, Carl Jr.

[584]

A. Sir, this is not under my authority, my authority is to assign them and to get them to the field, actually the installers fall under the outside plant management.

Q. As I understand it you were told by Mr. Galloway to find a connection on the wire or circuit or piers and install it to 221 Manor Road so as to be on the same party line as 411 Manor Road?

A. Sir, I was asked if possible to try to put this phone on 411 Manor Road.

Q. What was the other possibility to install it if you couldn't find it?

A. It was just if I could, if I couldn't I don't really know what the outcome or how the order would have been put in. I imagine it would have been held up until facilities had been put into it.

Q. Mr. Nold, are you aware that when the installer went out to do it, to install that that there were officers with the Orlando Police Department with equipment to install on that telephone?

A. No, sir.

Q. To your knowledge is that contrary to company regulations and tariffs?

A. All I was involved—

Q. Just answer the question. Is that contrary to

[589]

with that particular telephone?

A. Yes, sir; I did.

Q. Would you tell the Judge and tell the jury what your activity was, please?

A. I installed or attached a tape recorder and an automatic actuator to the telephone system.

Q. That was at 221 Manor Road?

A. At 221 Manor Road; yes, sir.

Q. I've got here several articles that the Clerk has identified for us as exhibit 22a and 22b for identification which I would like you to take a look at and identify if you can?

A. Yes, sir; this item marked 22a is an automatic actuator and the other item is a tape recorder.

Q. Have you seen these two items previously?

A. Yes, sir; I have. These are the two items that I installed in 221 Manor Road.

Q. Would you tell us and explain to us how you made that installation?

A. Yes, sir. The actuating device has a wire, this wire here attached to it, I attached this wire to the telephone wall outlet. I then—

Q. Would you tell us how you attached it to the telephone wall outlet?

A. Yes, sir; by loosening two screws the wall outlet and

[600]

the wires are color coated, by loosening two screws and attaching the red wire to the screw that had an already red wire attached to it and attached a green wire that already had a green wire attached to that particular screw.

Q. Was it necessary to take the cap off this wall outlet?

A. Yes, sir; it is a small plastic cap that fits over it. I removed this and attached the wire to the two screws.

Q. What other connections did you make?

A. I then took the power cord which is this cord right here.

Q. Would you unit those cords so that we can see them?

A. Yes, sir. I took the power cord which is the darker cord and plugged this into the regular 110 outlet in the wall and took the power outlet from the tape recorder which is this cord here and plugged it into the tape recorder and attached it to the regular 110 current outlet on the wall. I then took this wire here—

Q. You are referring now to the tape recorder?

A. The wire on the tape recorder, and I attached this to, I attached this to the automatic actuator and inserted it in input plug in the actuator that is marked as recorder motor outlet. I attached this wire, this wire then ran between the actuator and the

[601]

tape recorder wire.

Q. This is a dark black wire?

A. That is a dark black wire.

Q. What other installation did you make?

A. I then attached another wire which I don't have a replica of within the output jack on the actuator and the micro-

phone input jack which is located on the left side of the tape recorder.

Q. That is the left rear of the tape recorder?

A. The left rear of the tape recorder and the apparatus which was then attached to the wall and the tape recorder.

Q. After you had connected up all those wires, did you do anything to the tape recorder?

A. Yes, sir; I placed a tape on the tape recorder and an empty spool on the right hand side of the tape recorder and a full of tape on the left side of the tape recorder and ran the tape through the recording head on the tape recorder.

Q. Would point to the tape recorder and show us what you are talking about?

A. Yes, sir. This is the spool or this is the stud where the full spool of tape would be placed, this is the stud where the empty spool would be placed and the tape ran through this slot here on the front of

[602]

the tape recorder and the recording heads are down inside this slot.

Q. After you made that connection did you turn the tape recorder on?

A. Yes, sir; I did, I turned the tape recorder on by first depressing the record activating switch which is the third switch from the left hand side of the tape recorder. I depressed this and turned it and at the same time I turned the large switch, the large switch in the center of the machine to the right. I also adjusted the volume control switch which is the one on the left hand side, the second switch from the left hand side, I adjusted this so the recording level would be set properly and anything that was passed through the machine would have the proper recording level.

Q. Now, after you had hooked this all up and you turned the tape recorder on did the tape move?

A. Yes, sir; it did. Excuse me, there is one thing I forgot which is the most important thing, prior to doing any of this I turned the off-on switch to be on position. After all of this had been completed and the telephone receiver was lifted then the tape—

Q. Which telephone receiver was lifted?

A. The telephone receiver on the telephone at 221 Manor

[603]

Road, I lifted the receiver to make sure the tape recorder was operating properly and when I did this the tape began to move and I also, as I did this, I could see right behind the large switch on the machine, I could see the arrow move to the record level indicator and this showed me visually the machine was in operating condition and recording any conversation.

Q. Would you tip it up and show us?

A. Yes, sir; right up here there is an arrow and it is got a small dial and numbers ranging from one to ten.

Q. And that dial moved, is that the idea?

A. Yes, sir.

Q. After you got it installed and you picked up the telephone receiver did you then put the receiver back down again?

A. Yes, sir; I did and when I did the tape stopped moving through the recording head and the spool stopped moving and the recording head stopped.

Q. Did you check?

A. Yes, sir; I ran the tape back to the very beginning and started it over again and at this time I could hear the dial

tone on the tape itself, the dial tone I heard when I moved the receiver on the telephone.

Q. In addition to this tape recorder getting this dial tone were you checking it yourself?

[604]

A. Yes, sir; I had a pair of ear phones and they were plugged in too. There was a slot on the far side.

Q. Would you show us?

A. This jack here and I plugged into the external speaker jack and could hear what was coming through the tape recorder on the ear phones. I heard the same things through the ear phones that I later heard when I ran the tape back and played it. I heard the dial tone.

Q. Would you explain this to us, as I understand it the tape moved when you picked the receiver up and it stopped when you put the receiver down, is that correct?

A. Yes, sir; that is correct.

Q. In the meantime the tape recorder was on all the time?

A. The machine itself was on, the amplifier and the tubes were warm but the motor was not turning until the receiver was lifted from the cradle on the telephone.

Q. Well, when the motor did not run what would that do?

A. The tape would not turn and the tape would not record until the tape passed through the recording head on the machine.

Q. Then this was moving automatically?

A. Yes, sir; this is an automatic actuator.

[605]

Third day of trial, Thursday June 11, 1964.

THE COURT: The State ready to proceed?

MR. RUSS: The State is ready.

THE COURT: The defense?

MR. KIRKLAND: The defense has a formal matter to take up before the jury comes in, your Honor.

THE COURT: Note the presence of the defendants.

MR. KIRKLAND: Your Honor, in listening to the testimony of the witness Merrick who was on the stand yesterday not being conversant with electronic equipment and eavesdropping equipment, I spent a little time in research on it last night and the method adopted and used by the State in this case was confusing to me because I didn't quite understand the sophistication of the way it was done. In order to fully understand it, which, of course, is counsel's duty I inquired of Mr. Merrick very briefly about some of the questions in my mind out of the presence of Mr. Russ. He then went into a little more detail about it and the imprssion I got this morning is not, and I am sure not his fault, it is my fault, is not the impression I got from him yesterday. It appears and I

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would simply offer this by way of a proffer that instead of the recording being made by attaching an automatic actuator to a party line, that actually the officer attached a device for the interception of messages on to the direct line of the phone located at 411 Manor Road. Now, this again may be a distinction without a difference, but if your Honor please I think that if the State is relying upon Williams versus State and Giffiths versus State, in that case, in those cases, this was nothing more than the officer picking up the receiver and listening in on the phone. Now, Mr. Merrick explains to me that this automatic adaptor or actuator is not connected to the phone at all, that it is connected to the hot line and as such it is quite possible that instead of this being an eavesdropping on a party line that it is an intercep-

tion or an interference or a direct tap on the defendant's line and for that reason upon that proffer I would like to conduct a brief voir dire examination of the witness to make it clear for the record because to me this is probably the most important facet of the case thus far, the admissibility of this evidence.

[637]

I must reiterate, if your Honor please, the complete abhorrence that the recent Supreme Court have had and held wire tapping or eavesdropping, they have condemned it in every way and the cases in Florida have by inunendo not approved the practice but have approved what was done in that particular case. So, in view of the importance of the matter, in view that the telephone company representatives have testified, at least one of them, that this electronic equipment was there and to be attached in violation of none tariffs and regulations which is a violation of 605 of the Federal Communications Act and in view of the fact that even though I've had some experience with it in previous cases, I still don't know too much about the difference between eavesdropping and wire tapping and I'm satisfied the jury does not know that. I would like to briefly go into this question with the witness first by forming and stating an objection to the admissibility of the testimony on the tape recording on the grounds it was as a result of an unreasonable search and seizure and violation of fourth and fourteenth amendment as it applies

[638]

to the Declaration of Rights Section 22 of the Declaration of Rights of the State of Florida and it wouldn't take but a minute and I'm sure that your Honor would not object to my preserving it for the record this rather important constitutional right.

THE COURT: The State have anything to say?

MR. RUSS: Your Honor, it is my position that the testimony is abundantly clear as to how the connection was made, that the witness has very clearly testified that the connection was made at the point where the telephone was connected to the wall unit, to the wall box, and there's no question as regards the legality of such a connection on a party line system. The case of Giffith versus State, 111 Southern Second 282 dealt specifically with such an installation and I should like to read to you from the report of that case on page 283 where the statement of facts was laid out, the McCollum in this instance is the police officer, "The main question on this appeal revolves around the evidence and testimony of one Ed McCollum, a special investigator for the Attorney General of Florida. Several months before the

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of 644-7040?

A. At that particular time?

Q. Yes, sir.

A. On the 26th of July.

Q. All right, sir, when did you install this stuff?

A. On the 26th of July.

Q. That is what I am talking about. Now, Mr. Merrick, can you testify from your own knowledge whether or not the defendant Clyde Lee or any of the other defendants in this case were aware of the installation of that telephone at 221 Manor Road?

A. No, sir; I can not.

Q. Can you testify as to whether or not any of them told you that they were aware of that installation? Did any-

one tell you that they were aware of that installation at the time that it was installed there?

A. No, sir; nobody did.

Q. Now, after the Winter Park Telephone man had completed the installation of this telephone you then set about your business to put some other equipment in there, right?

A. Yes, sir; I did.

Q. And part of it was an automatic adaptor, is that correct?

A. An automatic actuator.

[654]

Q. Then it means on the same line?

A. The same party line telephone system; yes, sir.

Q. And the effect of it was that you could overhear any conversations that were had on any of the four party lines?

Q. And this could be done without picking up the receiver on the telephone at 221 Manor Road?

A. Yes, sir.

Q. And the way that the phone was actuated was by the decrease in the voltage on the line when the receiver was picked up at 411 Manor Road or when the phone was ringing at 411?

A. I believe I missed a word in there.

Q. Actuated, the tape recorder was actuated by the drop in the voltage occasioned by the ringing of the phone at 411 Manor Road or lifting of the receiver at 411 Manor Road, right?

A. Right, or any other phone on the party line; yes, sir.

Q. And this then made it necessary for you to guard the telephone receiver, it was constantly left in the—

A. Cradle, yes, sir.

Q. Cradle. Now, let me ask you this, on any of these conversations that you have overhead and that you have reported were they with persons that had private

[660]

A. What persons?

Q. The defendants?

A. No, sir.

Q. Did you attach to it a recorder equipment with the beep signal?

A. No, sir.

Q. Did you attach the apparatus or device not furnished by the telephone company without their express permission?

MR. RUSS: Judge, we have been through this and I object to it as repetitions.

MR. KIRKLAND: I am getting it right down in these cases.

THE COURT: The objection will be overruled. Finish up.

BY MR. KIRKLAND:

Q. Did you attach these things to this equipment without the express authority of the Winter Park Telephone Company?

A. Yes, sir.

Q. And in result of it you intercepted and recorded telephone conversation?

A. Yes, sir.

Q. Did you at any time have the permission of the sender of any of those calls to so do?

[664]

MR. RUSS: Judge, I object as repetitous.

MR. KIRKLAND: I am talking about the sender on it.

THE COURT: The objection is overruled. You can answer the question.

THE WITNESS: No, sir.

MR. KIRKLAND: I have no further voir dire examination. I would renew my objection, your Honor.

THE COURT: Do you have anything?

MR. RUSS: Just one, your Honor.

CROSS EXAMINATION (voir dire)

BY MR. RUSS:

Q. Mr. Merrick, as regards the location of this wall box is this on the interior of the Florida room or on the outside of the house at 221 Manor Road?

A. It was on the interior of the Florida Room.

Q. Inside the house?

A. Yes, sir.

Q. It was not necessary for you to go outside the house to make any connection, is that correct?

A. No, sir; it was not.

Q. Did you make any connection any place else other than that wall box that was inside the Florida room?

A. No, sir; I did not.

[665]

THE COURT: Do you concede the jury in the box?

MR. RUSS: The State does, your Honor.

MR. KIRKLAND: Yes, your Honor.

THE COURT: Proceed with your next witness.

MR. RUSS: Mr. Horner, please take the stand. Have you been sworn?

MR. HORNER: Yes.

HERBERT L. HORNER

(first having been duly sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. RUSS:

Q. Mr. Witness, would you direct your answers to these questions to the jury, please. Tell us first what your name is?

A. Herbert L. Horner.

Q. What is your occupation?

A. I am a police officer with the City of Orlando Police Department. I am attached to the intelligence unit.

Q. Is that the same as the Vice Squad?

A. That is right.

Q. Would you tell us where you live, please?

A. 521 West Harvard Avenue, Orlando.

Q. With reference to the date of August the 2nd, 1963, at that time were you acquainted with a house located in the Maitland, Orange County, Florida, listed as

[697].

house number 221 Manor Road?

A. Yes, sir; I was.

Q. On that particular date did you have an occasion to go to that house?

A. Yes, sir.

Q. Would you tell the jury about what time you went there?

A. I arrived there at approximately 5:00 P.M. in the afternoon.

Q. When you arrived there did you enter the house?

A. Yes, sir.

Q. Would you tell the jury what, if anything, you observed at that time?

A. At that time I entered the house Officer Merrick was there. He was seated in the Florida room which is at the Southeast side of the building. He was seated at a place in the Florida room near the telephone. He had a head set on his head, there was tape recording or a tape recorder there and an actuator unit attached to the tape recorder and in turn attached to the telephone wall outlet and these were also attached to the regular house voltage outlet.

Q. Now, at that time did you know what Mr. Merrick's full name was?

A. Yes, sir; Francis E. Merrick.

Q. As regards this particular house had you had any

[698]

contact or made any arrangements concerning this house prior to the date of August the 2nd, 1963?

A. Yes, sir.

Q. Would you tell the jury what that was, please?

A. I had had some contact with a Mr. Gale in Maitland, Florida, who was a realtor in charge of the premises

there and obtained through him permission to use the house.

Q. Did you receive a key for the house at that time?

A. Yes, sir.

Q. At the time that you arrived there, did you receive this same key from Mr. Merrick?

A. Yes, sir.

Q. While you were there at approximately 5:00 o'clock, on Friday, August the 2nd, 1963, did you observe whether there was anything on the tape recorder?

A. Yes, sir; there was a tape on the tape recorder that is known to me as tape x.

Q. If you would glance down here a minute, Mr. Horner, we have a tape that is on the tape recorder at this time on the left hand side and also a box which the tape came out of which has been placed in evidence as exhibit 23. Would you please examine it?

A. This is the tape that is known to me as tape x.

Q. Now, I also have over here two articles that have

[699]

A. It was approximately 6:16.

Q. It was in the afternoon?

A. In the afternoon; yes, sir.

Q. Do you have any, what is your best estimate as regards the termination of that conversation?

A. After the tape wire was put on the machine it terminated approximately a minute or two later.

Q. So that would have put it at approximately 6:20 to 6:22?

A. Approximately; yes, sir.

Q. Mr. Horner, I would like to ask you now to listen to another portion of exhibit number 24, commencing at counter marker 006.

MR. RUSS: Your Honor, I offer this portion of the exhibit in evidence going to the defendant Clyde Lee and to the defendant Cecil Merritt.

BY MR. RUSS:

Q. Mr. Horner, will you please listen to this?

(Whereupon the tape recorder was played audibly.)

BY MR. RUSS:

Q. Mr. Horner—

THE COURT: I will instruct the jury.

The conversation, the recording you just heard was received and introduced in the case of the defendant Clyde Lee and the defendant Cecil

[756]

St. Clair Merritt only and you are to disregard it as to the other defendants.

BY MR. RUSS:

Q. Mr. Horner, the counter position is now at 015. I will ask you whether you heard the conversation of which you just heard the tape recording when you were at the house at 221 Manor Road on Friday August the 2nd, 1963 with the head set on your head?

A. Yes, sir; I did.

Q. Based upon your personal hearing of this conversation and hearing it again on the recording exhibit number 24 are you able to state whether the recording is a complete and accurate recording of what you actually heard?

A. Yes, sir; it is.

Q. And as regards the conversation of which you have just heard a recording are you able to give us any further identification of it?

A. Yes, sir; this was an incoming call, Mr. Lee was the party answering the phone, it occured at 6:38 P.M. on the afternoon of August the 2nd, 1963. The man who made a statement about he just talked to the Pepsi Cola was Clyde Lee and the man who asked him if she was coming home was Cecil Merritt.

Q. Do you see Cecil Merritt here today?

[757]

on the grounds previously stated and you can return the jury.

(Whereupon the jury were seated in the jury box and all present at 10:20 A.M.)

MR. RUSS: Your Honor, I would recognize the jury in the box.

MR. KIRKLAND: The defendant does likewise.

THE COURT: Proceed.

BY MR. RUSS: (Continuing)

Q. Mr. Merrick, based upon the personal contact which you stated you had with Glen Brecheen on January the 20th 1964, would you tell this jury whether you can or cannot identify the voice of Glen Dulen Brecheen?

A. Yes, sir; I can identify the voice of Glen Brecheen.

Q. Referring now to these two conversations that you heard while at the house at 221 Manor Road on Monday August the 5th 1963, in which you say that you identified the common voice of Clyde Lee would you tell the jury what

further identification you can make as regards these two telephone conversations?

A. Yes, sir; On the first conversation it was an incoming telephone call. The conversation was—

Q. Would you speak up and direct your answer to the jury?

[1050]

A. Yes, sir. The call was an incoming telephone call and the voice of the party that answered the phone was that received the telephone call was a voice that I recognized as being the voice of the defendant Clyde Lee. The voice that was calling or making the telephone call was a voice I recognized as being the voice of the defendant Glen Brecheen and they discussed several numbers.

Q. As regards the second telephone call are you able to identify that further for the jury?

A. Yes, sir; the second telephone call was also an incoming telephone call and the voice of the party receiving the call was a voice that I recognized as being that of Clyde Lee. The voice of the party who made the telephone call, initiated the telephone call, was a voice that I recognized as being Cecil Merritt and they discussed about meeting each other, they talked about meeting each other.

Q. You say this happened between twelve noon and 4:00 P.M.?

A. Yes, sir; between twelve noon and 4:00 P.M.

Q. When did you leave the house at 221 Manor Road on Monday August the 5th 1963?

A. At approximately 4:00 P.M.

Q. At the time that you left was anyone else there?

[1051]

2nd through Thursday, August 8th and yet at this time that you were testifying that the numbers mentioned in

these assumed conversations of 524, 697, 586, 179 and 566 are also in your opinion the winning bond numbers, would you explain that variation, please?

MR. KIRKLAND: If the Court please, I object to any explanation as the result of a hypothetical question. He can give his opinion as to the hypothetical but can not explain how he arrived at his opinion.

THE COURT: The objection will be sustained.

BY MR. RUSS:

Q. Lieutenant Goode, considering now the prior testimony which you've given here this afternoon, considering the winning bond number for the time period August 1 through August 8, 1963, inclusive as determined from the Wall Street Journal and considering the answers that you've just given to the prior questions and considering also your training and knowledge and experience in the field of lottery, would you please assume this, assume that on Friday, August 2, 1963 at approximately 6:38 P.M. Clyde Lee and Cecil Merritt had a telephone conversation during which the number 524 was mentioned, that on the same date

[1535]

at approximately 6:55 P.M. Clyde Lee had a telephone conversation in which he mentioned the number 524 and in response to a question poised to him by the other party to the conversation which is, I quote, "What about yesterday?" Lee replied, "441." Assume further that on Monday, August 5, 1963, Lee made two telephone calls at approximately 5:24 P.M. and 5:25 P.M. in which he mentioned the number 697, assume further that on Tuesday, August 6, 1963, Clyde Lee made two telephone calls at 4:52 P.M. and 4:53 P.M. in which he mentioned the number 586, assume further that on Wednesday, August 7, 1963, Clyde Lee made one telephone call at 5:35 P.M. during which he

mentioned the number 179 and assume further that on Thursday August 8, 1963, Clyde Lee made two other telephone calls at 4:12 P.M. and 4:13 P.M. in which he mentioned the number 566, would you tell us whether or not you have an opinion concerning the meaning and the significance of the numbers mentioned by Mr. Lee in these conversations between August 2 and August 8, 1963, inclusive?

A. I do have.

Q. Would you tell the jury what your opinion is, please?

MR. KIRKLAND: We object as invading the province of the jury and not the proper hypotheti-

[1536]

cal and the statement contained in the hypothetical is contrary to what the record shows.

THE COURT: Objection overruled Answer the question.

THE WITNESS: In my opinion the conversation has reference to winning bond numbers on the dates mentioned with the exception of 441 which would be the winning bond number for the day before the call was made.

BY MR. RUSS:

Q. Which day was that, sir?

A. It would be August the first.

Q. All right, go ahead.

A. And the number of 179 on August the 7th which would have a one digit variation from—

Q. From what, sir?

A. The number that I have arrived at.

Q. Lieutenant Goode, I'd like to go on and ask you to consider the testimony that you've already given here this afternoon while testifying and considering further your training and experience and your knowledge in the field of lottery, would you assume for the purposes of this question that on Thursday, August 8, 1963 at approximately 3:34 P.M., Clyde Lee and Macon Tribue had a telephone conversation

[1537]

which in part contains the following statement by Mr. Lee and I quote, "She had 679 for a nickel but 697 is what come up." Response by Mr. Tribue, "Okay, 697." Response by Mr. Lee, "697, the number that come out" Do you have an opinion concerning the meaning and the significance of the number 697 as mentioned in this conversation?

A. I do.

Q. Would you please tell the jury what your opinion is?

MR. KIRKLAND: Same objection, your Honor.

THE COURT: Same ruling, answer the question.

THE WITNESS: In my opinion that conversation had to do with the winning bond number for Monday, August 5th.

BY MR. RUSS:

Q. Of what year?

A. 1963.

Q. Next question, would you consider the answers that you have given here in your testimony this afternoon and considering further your training and experience and knowledge in the field of lottery and would you assume for this question that a series of phone calls were made to 423-2867 as I will describe as follows, a telephone call to this number

on Friday, August 2, 1963, at approximately 6:55 P.M. in which in

[1538]

addition to mentioning the numbers 441 and 542, Mr. Lee mentioned in this order the numbers 28, 66 and 80 and then another telephone call to the same number by Mr. Lee on Monday, August 5, 1963, at approximately 5:24 P.M., Mr. Lee mentioned in addition to the number 697, the following three numbers in this order 12, 30 and 81, that further on Tuesday August the 6th, 1963, Mr. Lee called this same number at approximately 4:53 P.M. and mentioned in addition to the number 586, the following three numbers in this order, 11, 33 and 95 and that on Wednesday, August 7, 1963 at approximately 5:35 P.M. Mr. Lee called the same number and in addition to mentioning the number 179 he further mentioned in this order the following three numbers, 25, 70 and 92. And that on Thursday August 8, 1963, at approximately 4:12 P.M. Mr. Lee again called this same telephone number and mentioned in addition to the number 566, the following three numbers in this order, 15—excuse me, 15, 69 and 41. I would like you to tell this jury whether or not you have an opinion as regards the meaning and the significance of the additional three digit numbers referred to in each of these conversations?

A. Yes, sir; I have an opinion.

[1539]

Q. Now, would you state to the jury generally what your opinion is?

MR. KIRKLAND: If the Court please, the same objection. Meaning and significance is not expert testimony.

THE COURT: Same ruling, answer the question.

THE WITNESS: In my opinion those series of three two digit numbers represent the winning bolita number for those particular days mentioned.

BY MR. RUSS:

Q. And would that be one winning number or more than one winning number?

A. It would constitute one drawing per day, the series of three winning numbers for each day.

Q. Considering the date of Friday, August 2, 1963, in which it is assumed the number 28, 66 and 80 was mentioned in addition to the number 524, what in your opinion did the numbers 28, 66 and 80 represent?

A. In my opinion they would represent the winning Bolita numbers for Friday August the 2nd.

Q. Would you tell us what in your opinion the numbers 12, 30 and 81 assumed to be mentioned in the conversation of Monday August 5th, 1963, represent?

A. In my opinion they would represent the winning Bolita

[1540]

numbers for Monday, August the 5th.

Q. And in your opinion would you tell us what the numbers 11, 33 and 95 mentioned in the conversation as assumed of Tuesday, August the 6th 1963, represent?

A. In my opinion they would represent the winning Bolita numbers for Tuesday, August the 6th.

Q. And as regards the date of Wednesday, August 7, 1963 would you tell us what in your opinion the number assumed to be stated of 25, 70 and 92 represent?

A. In my opinion they would represent the winning Bolita numbers for that date.

Q. And as regards the assumed telephone conversation of Thursday August 8, 1963, would you tell us what in your opinion the numbers 15, 69 and 41 represent?

A. In my opinion they would represent the winning Bolita numbers for that particular date.

Q. Now, Lieutenant Goode, for the next series of questions, I would like you to please consider the testimony that you've given here this afternoon while you've been on the stand and I'd like you to consider further your training and experience and knowledge in the field of lottery. I'd then like you to assume that on Monday afternoon August the 5th, 1963, Glen Brecheen called Clyde Lee on the telephone and men-

[1541]

tioned the following series of numbers to Mr. Lee in this order, 8763, 5663, 5002, 1002 and assume further that on Wednesday, August 7, 1963 at approximately 2:17 P.M. in the afternoon, Glen Brecheen again called Mr. Lee on the telephone in which they had the following conversation, Mr. Brecheen, "I got 566 for three with you, how about scratching that out and putting two others on 876?" Response by Mr. Lee, "876." Response by Mr. Brecheen, "Yeh, the other one on 500." Response by Mr. Lee, "500, Okay." Assume further that on the following date Thursday, August the 8th, 1963, at approximately 4:11 P.M. in the afternoon Glen Brecheen again spoke to Mr. Clyde Lee on the telephone during which they had the following conversation, Mr. Brecheen, "Remember that one I took off yesterday?" Response by Mr. Lee, "Ya, un huh." Response by Mr. Brecheen, "It come today." Response by Mr. Lee, "God damn." Response by Mr. Brecheen, "566." Response by Mr. Lee, "566." Response by Mr. Brecheen "Ain't that a bitch." Response by Mr. Lee, "It's hard luck, ain't it?" Response by Mr. Brecheen, "Ya, it sure is." Assume further that on the same Thursday afternoon of August the 8th 1963, approximately a minute later, at 5:12 P.M., excuse me, at 4:12

[1542]

P.M., Mr. Lee had the following telephone conversation with the second person by Mr. Lee, "566." Response by

second voice, "566." Response by Mr. Lee, "You know I had a guy who has been playing $300 a day on 566 with me." Response by second voice, "And you did not play?" Response by Mr. Lee, "Yesterday he told me to cancel it, he said play it for me today, but cut it off after today and it comes out today." Second voice, "And you did not have none on it?" Response by Mr. Lee "No." Response by second voice, "Goodness gracious that is a bad—" Response by Lee, "I bet he is sick." Response by second voice, "I know he is." Considering this, Lieutenant Goode, I would like to ask you concerning your opinion on several questions. First I would like to ask you if you have an opinion concerning the meaning and the significance mentioned in the conversation between Mr. Brecheen and Mr. Lee of Monday August 5, 1963, in which it is assumed the numbers 8763, 5663, 5002 and 1002 were mentioned?

A. I do have an opinion.

Q. Would you tell the jury what your opinion is?

MR. KIRKLAND: Same objection, your Honor.

THE COURT: Same ruling. Answer the question.

[1543]

THE WITNESS: In my opinion that is a series of bond bets being placed.

BY MR. RUSS:

Q. Would you break it down for us?

A. Two of the bets had Three Dollars placed on the numbers and the last two, Two Dollar bets each.

Q. Considering the number 8763, what in your opinion is the meaning and significance of that?

A. That is a Three Dollar bet on that particular number.

Q. On what particular number?

A. 873, I believe you said.

Q. No, I said 8763.

A. 876, it is a Three Dollar bet on 876.

Q. And a number 5663?

A. That is a Three Dollar bet on 566.

Q. And the number 5002?

A. That is a Two Dollar bet on 500.

Q. And the number 1002?

A. Two Dollar bet on 100.

Q. Considering the same question I've asked you, the long question concerning the conversation of Wednesday, August 7, 1963, in relationship to what you have just stated concerning your opinion of the conversation of Monday, August 5, 1963, now when Brecheen on Wednesday is assumed to have said "I

[1544]

MR. RUSS: That's correct, your Honor, my amended offer is as follows: exhibit 1A to the defendant Lee. Exhibit 1B through 1Q is withdrawn. Exhibit 1X is offered to the defendant Bradshaw. Exhibit 2 is withdrawn. Exhibit 3 is offered to the defendant Lee. Exhibit 4 is offered to the defendant Lee. Exhibit 5a and 5b are offered to the defendant Lee. Exhibit 7 is offered to the defendant Lee. Exhibit 8 is offered to the defendant Lee. Exhibit 9 is offered to the defendant Lee. Exhibits 10, 10a, 11, 12, 13, 14, 15a, 15b, 16, 17, 18 and 19, 21A, 21b, are offered to the defendant Lee. Exhibits 23, 24, 25, 26, 27 and 28 which have been identified as magnetic tapes are offered in so far as those portions of those tapes that have been played in the presence of the jury during the course of this jury trial are offered to the defendants Lee, Merritt, Brecheen, Bradshaw and Locke. That por-

tion of Exhibit 27 which purports to contain a conversation between the defendants Lee and Macon Tribue which took place on or about August 8, 1963, commencing at 3:43 P.M. and which begins approximately at the counter

[1589]

position 670, that tape is offered to the defendant Macon Tribue. Exhibit 29a, 29b, 29c, 29d are offered to the defendant Lee. Exhibit 30a, 30b, 30c,—excuse me, exhibit 30a is offered to the defendant Bradshaw. 30b and and 30c are offered to the defendant Lee. 30d as in dog is withdrawn. Exhibit 31a is withdrawn. Exhibit 31b and 31c and 31d and 31e and 31f and 31g, h, i, and 31j are offered to the defendant Lee. In addition exhibit 31d and 31j are offered to the defendant Locke Exhibit 32a is offered to the defendant Lee, exhibit 32b is offered to the defendant Locke, exhibit 33a, 33b and 33c and 33d as in dog are offered to the defendant Lee. Exhibit 33e as in easy and 33f as in fox are offered to the defendant Tribue. Exhibit 35 is offered to the defendant Lee. Exhibit 36a, b, c, d, e, and f, are offered to the defendants Lee, Merritt, Brecheen, Bradshaw, Locke and Tribue and I believe that exhibit 38 has already been admitted into evidence and published to the jury.

I would again offer that to clarify the record to the defendant Lee.

THE COURT: The defense have anything for the

[1590]

record in view of the reoffer?

MR. KIRKLAND: That modifies it a bit, if your Honor pleases, but we still would object on the grounds that all of this evidence that they referred to is the result of an unreasonable and unlawful search and seizure, there has

been a showing of connection between the house raided on Cameron Avenue on Manor Road, that this evidence was obtained as the result of an unlawful and illegal wire tapping, illegal electronic surveillance. Further, it is the fruit of the poisoned tree that the court has held to exist at the house on Cameron Road. There has been no connection between this evidence as presented and the defendants that it is presented against and that we move to suppress the evidence on the grounds of illegal search and seizure, for return of the evidence on the grounds that it was unlawful and unreasonably seized.

THE COURT: The objection will be overruled and each of the exhibits will be received in evidence as to the defendants indicated in the offer. You want to dispose of these motions for directed verdict?

[1591]

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA
-vs-
PREMISES LOCATED AT
411 MANOR ROAD
MAITLAND, ORANGE COUNTY, FLORIDA

SEARCH WARRANT

IN THE NAME OF THE STATE OF FLORIDA:
TO: THE SHERIFF OF ORANGE COUNTY, FLORIDA, AND HIS LAWFUL DEPUTIES; THE CONSTABLES OF ORANGE COUNTY, FLORIDA, AND THEIR LAWFUL DEPUTIES.

WHEREAS, a sworn application under oath and in writing has this day been made before me, the undersigned FRANK A. SMITH, Circuit Judge of the Ninth Judicial Circuit of Florida by HERBERT HORNER, FRANCIS E. MERRICK, JOHN R. BACHMAN, and JAMES GOODE for a search warrant

which states that affiants have reason to believe and do believe that those certain premises located in Orange County, Florida, described as follows, to-wit:

> A one story, concrete block dwelling house located at 411 Manor Road, Maitland, Orange County, Florida, which dwelling house is located on the north side of Manor Road, facing south, and which dwelling house is on the northeast corner of the intersection of Manor Road and Live Oak Street, said dwelling house is painted white with brown trim,

being the premises occupied by or under the control of Clyde Lee, there are now being kept on said premises certain lottery tickets, records, implements, devices and paraphernalia used for the purpose of promoting and conducting a lottery, which are now being kept and used in violation of the laws of the State of Florida prohibiting lottery. That the facts tending to establish the grounds for this application and probable cause of affiants' belief that such facts exist are as follows:

That affiant Herbert Horner has personally spoken with Clyde Lee and can recognize and identify the voice of Clyde Lee. That at approximately 5:25 p.m. on August 5, 1963, affiant Horner was in a dwelling house located at 221 Manor Road, Maitland, Orange County, Florida, listening on a telephone located in said dwelling house, which telephone was numbered 644-7040, to conversations conducted on this party line. At this time and place affiant Horner heard the following conversation between a male voice which he recognized and identified as that of Clyde Lee and a second male voice belonging to a person referred to as Honey:

Unidentified Male Voice: Hello.
Lee: 697—Listen, is Honey there? Let me talk to him, please.
Honey: Hello.
Lee: Hello, Honey.
Honey: How are you doing?
Lee: Okay, 697.
Honey: 697.

Lee: Unha. Listen, that MDL, tell that woman we don't want no more business from her. Just cut her off on the weekends and all just cut her off period. Just tell her we do not want no more. That woman was over $150.00 short the last two weeks. She was $150.00 short. She don't send no money at all any more. She sends you $50.00 worth of business and $2.00, and just tell her to quit. We do not want nothing from her. Cuber, bond, day house, or nothing.

Unidentified Male Voice: Let's see, 478.
Lee: Yes, no no, 697.
Honey: Oh, 697.
Lee: 697.
Honey: Oh, okay.

Lee: Okay, Honey, talk to you later.

That on several occasions between August 2, 1963 and August 9, 1963, affiant Francis E. Merrick personally observed Clyde Lee driving a 1963 white Chevrolet sedan east on Manor Road, Maitland, Orange County, Florida, and turn into the driveway of a one story, concrete block dwelling house located at 411 Manor Road, Maitland, Orange County, Florida, which dwelling house was located on the north side of Manor Road, facing south, and which dwelling house was on the northeast corner of the intersection of Manor Road and Live Oak Street; said dwelling house being painted white with brown trim.

That on August 9, 1963 at the business offices of the Winter Park Telephone Company in Winter Park, Florida, affiant John R. Bachman personally examined the records of the Winter Park Telephone Company, pertaining to that company's telephone numbered 644-7040 which records reflect that said telephone is located at 221 Manor Road, Maitland, Orange County, Florida, Said records further reflect that the telephone number 644-7040 is connected by a party line to a telephone of the Winter Park Telephone Company bearing number 644-3780 which telephone has been located continuously since July 19, 1963, up to the

present time at 411 Manor Road, Maitland, Orange County, Florida.

That affiant Herbert Horner has personally spoken with Clyde Lee and can recognize and identify the voice of Clyde Lee. That at approximately 8:53 a.m. on August 10, 1963, affiant Horner was in a dwelling house located at 221 Manor Road, Maitland, Orange County, Florida, listening on a telephone located in said dwelling house, which telephone was numbered 644-7040, to conversations conducted on this party line on an incoming call. At this time and place affiant Horner heard the following conversation between a male voice which he recognized and identified as that of Clyde Lee and a second male voice:

Unidentified Male voice: I've got some of Bobo's stuff here.

Lee: Call it out to me.

Voice: I've got to get it.

(long pause)

Voice:
70—$50.00
11— 75.00
13— 25.00
10— 25.00
100—25.00
27— 50.00
72— 50.00
16— 50.00
42— 50.00
86— 50.00
70— 50.00
25— 50.00
72— 10.00
72— 10.00
32— 10.00
78— 10.00
84— 10.00

25— 10.00
29— 5.00
27— 5.00
94— 1.00
84— 3.50
22— 1.00
41—50¢
15— 3.00
97— 2.00
32— 2.00
68—25¢
86—25¢
38—25¢
47—25¢
79— 2.25¢
97—25¢
07—25¢
09—25¢
10— 1.75
16—50¢
25—25¢
38—25¢
100—25¢
05— 1.00
27— 1.00
64— 10.00
33—30¢
27—30¢
37—30¢
62—30¢
23—30¢

That's it.

Lee: O.K.

Affiant James Goode states that he is a lieutenant with the Orlando, Orange County, Florida, Police Department and has been a member of this Police Department for more than twelve

years. That as a police officer he has participated in investigations involving violations of the laws of Florida prohibiting lottery, and has testified as an expert on lottery in State and Federal courts. Affiant Goode knows and recognizes Clyde Lee as a convicted lottery man, and has personally observed Clyde Lee in a lottery check-up house on several occasions. Affiant Goode recognizes the words "Cuba", "Bond", and "Dayhouse" as the names of lotteries conducted in Central Florida. Affiant Goode believes that the incoming call overheard by Herbert Horner at approximately 8:53 a.m. on August 10, 1963, and described above, was a report of lottery bets connected with a lottery known as "Bolita" or "Cuba."

And it appears to the Court that affiants are reputable citizens of Orange County, State of Florida, and that the facts set forth in said affidavits show and constitute probable cause for the issuance of this search warrant and the Court being satisfied of the existence of said grounds set forth in said application, or that there is probable cause to believe in their existence.

NOW, THEREFORE, you, or either of you, are hereby commanded in the name of the State of Florida, in the daytime or in the nighttime or on Sunday, to enter said premises located in Orange County, Florida, to-wit:

> A one story, concrete block dwelling house located at 411 Manor Road, Maitland, Orange County, Florida, which dwelling house is located on the north side of Manor Road, facing south, and which dwelling house is on the northeast corner of the intersection of Manor Road and Live Oak Street, said dwelling house is painted white with brown trim,

and if lottery tickets, records, implements, devices, or paraphernalia used for the purpose of promoting and conducting a lottery, or any part thereof, shall be found on said premises, then you are authorized and commanded to seize and safely keep the same in your possession to be disposed of according to law, and

to forthwith make return of your doings in the premises upon executing this warrant, which you are hereby commanded to execute as the law directs within ten (10) days from the date hereof.

You are further commanded, in the event that you seize any of the said property hereinbefore described, to make up, at the time and place of seizure, a full, true and itemized list and inventory of all things seized and taken, in duplicate, signed by you, and to then and there give and deliver one of said duplicate copies thereof to the person from whom possession shall be taken, if taken from the possession of anyone, together with a duplicate copy of this search warrant, and if not taken from the possession of anyone, then to any persons in charge of said premises, and in the absence of any such person, to leave the same on the premises.

WITNESS my hand and seal this 10th day of August A.D. 1963.

s/s FRANK A. SMITH
CIRCUIT JUDGE, NINTH JUDICIAL CIRCUIT
ORANGE COUNTY, FLORIDA

INVENTORY AND RECEIPT OF PROPERTY SEIZED UNDER THE WITHIN SEARCH WARRANT

A/ Taken from person of Clyde Lee in Living Room of 411 Manor Road. (1) Knife (2) Three keys in brown key case (3) Black Case with $1400.00 & Drivers License & other papers (4) $310.00 in one fold w/ rubber band (5) $138.00 in one fold w/ rubber band (6) Key to back door of 411 Manor Rd. (7) $.25 in coin.

B/ Taken from Bedroom in North-West corner of 411 Manor Road. (1) One brown leather briefcase containing lewd books & photographs, & other papers (2) Misc. papers & tax records (3) One paper bag containing coins.

C/ Taken from living room table @ 411 Manor Road. (1) Papers with phone numbers & telephone bill to Jack Martin. (2) One RCA Victor Strato-World radio.

D/ Taken from Kitchen Utility room in South East corner of Kitchen at 411 Manor Rd. (1) Clary adding machine (electric) SN169-283563-A (2) Electric Remington adding machine SN 169501394A (3) Electric Remington adding machine SN (This machine found in Dining area off Kitchen) also with machine—paper clips, stapler, & staples.

E/ Taken from Kitchen at 411 Manor Rd. (1) One red leather Camera case containing $510.00 in Currency. (2) Tapes & papers found in trash box. (3) Cardboard box found in Kitchen cabinet drawer containing coin wrappers, pencils, etc. (4) Paper bag containing Eight (8) lined pads. (5) Paper bag containing yellow lined pad.

This 10th day of August, A.D. 1963 s/s B. G. Lanner, Officer.

RETURN

STATE OF FLORIDA
COUNTY OF ORANGE

Received the within search warrant on the 10th day of August A.D. 1963, and executed the same in Orange County, Florida, on the 10th day of August A.D. 1963, by searching the premises described herein, and by taking into my custody and possession the property described above in the inventory and Receipt of Property Seized.

I further executed the said warrant by delivering a duplicate copy of this warrant to Clyde Franklin Lee and by making and delivering to the said Clyde Franklin Lee a true inventory of the property seized.

R. F. Tanner
Officer

I, R. F. Tanner, the officer by whom the foregoing warrant was executed, do swear that the above inventory contains a true and detailed account of all property taken by me on said warrant.

R. F. Tanner
Officer

Sworn to and subscribed before me
this 13 day of August
A.D. 1963.
s/s Lyda W. Roberson
Notary Public

A TRUE AND CORRECT COPY
ATTEST:
CHAS. E. LIMPUS, CLERK
BY: s/s N. Kinlaw C.D.C.

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1966

CLYDE FRANKLIN LEE,
GLEN DULEN BRECHEEN and
CECIL ST. CLAIR MERRITT,
Appellants,

CASE NO. 36.

v.

STATE OF FLORIDA,
Appellee.

Opinion filed September 21, 1966.

Appeal from the Criminal Court of
Record for Orange County;
Walter N. Burnside, Jr., Judge.

Edward R. Kirkland of Kirkland
Johnson Smith & Ervin, Orlando,
and William A. Harmening, Winter
Park, for appellants.

Earl Faircloth, Attorney General,
Tallahassee, and William D. Roth,
Assistant Attorney General, Lakeland,
for appellee.

FUSSELL, CARROLL W., Associate Judge.

Defendants appeal from their conviction for a violation of

the lottery laws. Their principal contention is that the lower court committed an error in permitting taped recordings of a telephone conversation to be introduced into evidence at the trial. They maintain that these recordings were the result of wiretapping and are illegal and inadmissible in evidence.

The law on wiretapping in Florida was most thoroughly and clearly stated by Judge Carroll in Griffith v. State, Fla.App. 1959, 111 So.2d 282, which was later followed and re-affirmed in Barber v. State, Fla.App.1965, 172 So.2d 857. Certiorari was denied by the Supreme Court in each of these two cases.

In the Griffith case, supra, the court observed that under the common law and general rule wiretapped evidence was admissible, and that, in order to change this rule, either a state or federal statute would be required or there must be a state or federal constitutional inhibition or the court must determine that wiretapping was in violation of the general principle of law.

In the Griffith case, supra, it was further determined that there were no state or federal statutes applicable in Florida which would make wiretapping illegal and inadmissible in evidence, but that wiretapping is illegal in Florida because it does violate Section 12 of the Declaration of Rights of the Florida Constitution, which provides:

> "Section 12 . . . No person shall be . . . compelled in any criminal case to be a witness against himself. . . ."

and also violated Section 22 of the Declaration of Rights of the Florida Constitution, which provides:

> "Section 22 . . . The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated. . . ."

The first case in Florida dealing with this subject was Perez v. State, Fla.1955, 81 So.2d 201, decided by the Supreme Court of Florida. In this case an informant purchased a lottery ticket over the telephone while an officer listened over an extension phone. The court held that this was sufficient as a basis for the officer to make his application for a search warrant.

The next case was Williams v. State, Fla.App.1959, 109 So.2d 379, decided by the Second District Court of Appeal. In this case the sheriff rented a party line and the deputy sheriff listened and recorded the conversations of the defendant thereon. The defendant had been told that the party line was being rented by a colored family, and the defendant did not know that the sheriff had rented the line. Recorded evidence of these conversations was held admissible.

The next case was the Griffith case, supra, decided by the First District Court of Appeal. In this case the officer rented a party line and then fixed it so that he could attach a long line to it and walk around the room without standing by the telephone at all times. Under this arrangement there was no tapping sound which would give alarm to the defendant that his conversation was being listened to. This was held not to be an illegal wiretap, and the officer was permitted to testify.

The last case, Barber v. State, Fla.App.1965, 172 So.2d 857, was also decided by the First District Court of Appeal. In this case a tape recording of a telephone conversation of the defendant with the prosecuting witness was admitted in evidence over the objection of the defendant that it was the result of wiretapping. The prosecuting witness had told the prosecuting officers of prior conversations with the defendant and consented to their making recordings of this conversation by means of wires attached by the deputy sheriff to the prosecuting witness' telephone receiver. The recording was made without the defendant's knowledge or consent. The court held that this was not the result of wiretapping and was admissible in evidence.

The facts in the instant case differ only from the above cases in that defendants contend that the telephone company itself knew of the plan of the enforcement officers and arranged and assisted them in the preliminary stages toward making the recordings. The facts in the instant case show that the defendants requested a private line telephone, but were informed by the telephone company that no private line was then available and that they could obtain service only through a party line. The

police department then arranged with the telephone company to have a telephone installed on the same party line. An automatic actuator and a tape recorder were attached to the telephone on the party line and recordings were made over a period of some eight days of conversations of the defendants on their telephone on the same party line. The recordings of these conversations were admitted in evidence.

There appear to be no material distinguishing facts in the Williams, Griffith and Barber cases, above cited, from those in the instant case, and it is this court's opinion that these cases are controlling.

The appellants seek to obtain solace in the able dissenting opinion of Judge Rawls in the Barber case, supra. However, it is the duty of the courts to finally determine and to settle close legal questions, even though as often is the case, there are able conflicting views. The Florida courts have held, and rightly so in our opinion, that recordings of telephone conversations made with the consent of one of the parties to the conversation, either over a direct line or by extension, are legal and properly admissible in evidence. Also, that recordings made over a party line, where the conversant must or should know that his conversation can be heard over any of the other party lines, where there has been no direct tapping or invasion of the lines belonging exclusively to the defendant, then recordings made through the party lines are not illegal and are admissible in evidence.

Defendants in this case further object to the introduction in evidence of certain personal property items obtained as results of the search of a residence. It is the contention of the defendants that the search was not executed in accordance with the law. Appellee contends that this objection comes too late as there was no motion to suppress prior to the trial and that it cannot now be raised on appeal, citing in support thereof Robertson v. State, 1927, 94 Fla.770, 114 So. 534, and Moffett v. State, Fla.App. 1965, 179 So.2d 408. It does not appear, however, that these cases were called to the attention of the lower court and certain articles of personal property were first admitted in evidence.

However, the court later reversed this ruling and excluded these articles from evidence and instructed the jury to disregard hem.

It is, therefore, our opinion that under these facts no harmful error has occurred, and the judgment appealed is affirmed.

SMITH, C. J., WALDEN, J., concur.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

STATE OF FLORIDA
VS.
CLYDE FRANKLIN LEE alias J. MARTIN, alias JACK MARTIN,

CASE No. 96864
CHARGE: COUNT ONE: CONSPIRACY

Now on this day came in person the Defendant Clyde Franklin Lee in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Clyde Franklin Lee, having been tried and convicted at this term of court to the crime of Conspiracy as charged in the first Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgement, order and sentence of the Court that you, Clyde Franklin Lee, for the crime of which you have been and stand convicted, as charged in the first Count ..... of the Information, be imprisoned by confinement at hard labor for ONE (1) YEAR in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the

above is a true and correct copy of Judgment and Sentence imposed upon CLYDE FRANKLIN LEE, in Case No. 96864, as recorded in Minute Book No. 2, Page 5, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS, Clerk of
Criminal Court of Record

By: ..... D.C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

STATE OF FLORIDA
VS.
CLYDE FRANKLIN LEE alias
J. MARTIN, alias JACK
MARTIN,

CASE No. 96864
CHARGE: COUNT FIVE:
VIOLATION OF LOTTERY LAW

Now on this day came in person the Defendant Clyde Franklin Lee in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Clyde Franklin Lee, having been tried and convicted at this term of court to the crime of Violation of Lottery Law as charged in the fifth Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgement, order and sentence of the Court that you, Clyde Franklin Lee, for the crime of which you have been and stand convicted as charged in the fifth Count ..... of the Information, be imprisoned by confinement at hard labor for FIVE (5) YEARS in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon CLYDE FRANKLIN LEE, in Case No. 96864, as recorded in Minute Book No. 2, Page 5, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS, Clerk of
Criminal Court of Record

By: ..... D.C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

STATE OF FLORIDA
VS.
CECIL ST. CLAIR MERRITT

CASE No. 96864
CHARGE: COUNT ONE:
CONSPIRACY

Now on this day came in person the Defendant Cecil St. Clair Merritt in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Cecil St. Clair Merritt, having been tried and convicted at this term of court to the crime of Conspiracy as charged in the first Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgement, order and sentence of the Court that you, Cecil St. Clair Merritt, for the crime of which you have been and stand convicted, as charged in the first Count .....

of the Information, be imprisoned by confinement at hard labor for ONE (1) YEAR in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon CECIL ST. CLAIR MERRITT, in Case No. 96864, as recorded in Minute Book No. 2, Page 5 and 6, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS, Clerk of
Criminal Court of Record

By: ..... D.C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

STATE OF FLORIDA
VS.
CECILS T .CLAIR MERRITT

CASE No. 96864
CHARGE: COUNT FIVE:
VIOLATION OF LOTTERY LAW

Now on this day came in person the Defendant Cecil St. Clair Merritt in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Cecil St. Clair Merritt, having been tried and convicted at this term of court to the crime of Violation of Lottery Law as charged in the fifth Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgement, order and sentence of the Court that you, Cecil St. Clair Merritt, for the crime of which

you have been and stand convicted, as charged in the fifth Count ..... of the Information, be imprisoned by confinement at hard labor for THREE (3) YEARS in the state Pentitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon CECIL ST. CLAIR MERRITT, in Case No. 96864, as recorded in Minute Book No. 2, Page 5 and 6, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS, Clerk of
Criminal Court of Record

By: ..... D.C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

STATE OF FLORIDA
VS.
GLEN DULIN BRECHEEN

CASE No. 96864
CHARGE: COUNT ONE:
CONSPIRACY

Now on this day came in person the Defendant Glen Dulin Brecheen in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Glen Dulin Brecheen, having been tried and convicted at this term of court to the crime of Conspiracy as charged in the first Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgement, order and sentence of the

Court that you, Glen Dulin Brecheen, for the crime of which you have been and stand convicted, as charged in the first Count ..... of the Information, be imprisoned by confinement at hard labor for ONE (1) YEAR in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon GLEN DULIN BRECHEEN, in Case No. 96864, as recorded in Minute Book No. 2, Page 5 and 6, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS, Clerk of
Criminal Court of Record

By: ..... D.C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

STATE OF FLORIDA
VS.
GLEN DULIN BRECHEEN

CASE No. 96864
CHARGE: COUNT FIVE:
VIOLATION OF LOTTERY LAW

Now on this day came in person the Defendant Glen Dulin Brecheen in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Glen Dulin Brecheen, having been tried and convicted at this term of court to the crime of Violation of Lottery Law as charged in the fifth Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgement, order and sentence of the Court that you, Glen Dulin Brecheen, for the crime of which you have been and stand convicted, as charged in the fifth Count ..... of the Information, be imprisoned by confinement at hard labor for THREE (3) YEARS in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon GLEN DULIN BRECHEEN, in Case No. 96864, as recorded in Minute Book No. 2, Page 5 and 6, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., AD., 19.....

CHAS. E. LIMPUS, Clerk of
Criminal Court of Record

By: ..... D.C.

No. 1405

FILED
MAY 19 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

1967

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT,
Petitioners,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE

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No.

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT,
Petitioners,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners submit herewith their jurisdictional statement as required by Rule 23 of the Rules of the Supreme Court of the United States.

OPINION BELOW

1. The opinion below, *Lee* v. *State* is reported in 191 So2d, 84. Petition for re-hearing was denied November 10, 1966. Petition for Writ of Certiorari to the Supreme Court of Florida was denied January 31, 1967, Case No. 35888. Petition for Re-hearing in the same court was denied February 23, 1967, Case No. 35888. The above opinion and orders of the respective courts are attached hereto as Appendix A.

GROUNDS FOR JURISDICTION

1. Petition for Writ of Certiorari to the Supreme Court of the United States is brought pursuant to 28 USC 1257 (3).

2. Petitioners seek review of, the Judgment of the District Court of Appeals, Fourth District, affirming the conviction of the petitioners, reported in 191 So2d, 84, filed September 21, 1966, and the Order of the Supreme Court of Florida denying Petitioners Writ of Certiorari entered January 31, 1967, and the subsequent Petition for Re-hearing in the same court which order was entered February 23, 1967.

QUESTIONS PRESENTED

Whether the trial Court erred over defendants' objections, in admitting into evidence tape recordings of telephone conversations in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Sections 1, 12 and 22 of the Declaration of Rights of the Florida Constitution and Section 822.10, Florida Statutes (F.S.A.).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or in-

dictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV (Section 1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Florida

Declaration of Rights

(Section 1) Equality; inherent rights—All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring possessing and protecting property, and pursueing happiness and obtaining safety.

(Section 12) Double jeopardy; self-incrimination; eminent domain; right to work—No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation. The right of persons to work shall not be denied or abridged on account of membership or

nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

(Section 22) Searches and seizures—The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

Florida Statutes Annotated

Section 822.10 Injuring or tapping telegraph or telephone lines, etc.

Whoever, without the consent of the owner thereof, willfully destroys, damages, or in any way injures any telegraph, telephone, radio, television or television community antenna system poles, cables, wires, fixtures, antennas, amplifiers, or other apparatus, equipment, or appliances; or obstructs, impedes, or impairs the service of any telegraph, telephone, radio, television or television community antenna system line or lines, or the transmission of messages thereover; or attaches any unauthorized device or equipment to any telegraph, telephone, radio, television or television community antenna system line, antenna, pole, cable, wire, fixture, amplifier, or other apparatus, instrument, equipment or appliance, or taps or connects, directly or indirectly, by wire or any other means whatsoever, to or with any telegraph or telephone line so as to hear, or be in position to hear, or to enable any other person to hear, or be in position to hear, for any use or purpose whatsoever, any message going over said line, or for the purpose of receiving, or enabling any other person to receive any unauthorized service over said line,

or uses, or attempts to use, in any manner or for any purpose, or communicates in any way, any information so obtained; or aids, agrees with, employs, or conspires with, any person to do or cause to be done any of the acts hereinbefore mentioned, in cases where the property damage does not exceed two hundred dollars, shall be punished by fine not exceeding $500.00 or by imprisonment not exceeding one year in the county jail; provided that in cases where the property damage exceeds two hundred dollars or any person who, having been convicted of violating the provisions of this section, thereafter violates the provisions hereof, shall be punished, upon conviction, by imprisonment in the state prison for a period not exceeding fifteen years or by a fine not exceeding $5,000.00, or both.

STATEMENT OF THE CASE

The defendants below, LEE, BRECHEEN and MERRITT were brought before the Criminal Court of record in and for Orange County, Florida, on 13 count Information charging the defendants with violation of the lottery laws of the State of Florida, as set forth in the Information found on pages 1 thru 6 of the Record on Appeal (See appendix). Trial of the case was held before Honorable Walter N. Burnsides from June 9, 1964 to June 19, 1964, at the termination of which the following verdicts were returned in respect to these petitioners:

Clyde Lee—Guilty as charged in Counts I, V, VII, VIII, IX, X, XI, & XII, not guilty as charged in Counts II, III, IV, & VI.

Cecil St. Clair Merritt—Guilty as charged in Counts I, V & XIII, not guilty as charged in Counts II, III, & IV.

Glen Dulen Brecheen—Guilty as charged in Counts I, V, IX, X, XI, & XII, not guilty as charged in Counts II, III, & IV.

Petitioners were adjudged guilty and sentenced to State Penitentiary for conspiracy and violation of the lottery laws. That on the 2nd day of July, 1964, Motion for New Trial was filed and on the 21st day of July, 1964, the Court entered Order denying Motion for New Trial. Said Motion for New Trial embraced the question presented to this Court in the instant case and is found on page 22 and 23 in the Record on Appeal (See Appendix). Furthermore, said question before the Court was preserved in the Assignment of Errors as indicated on page 40 and 41 of the Record on Appeal. (See Appendix.)

The facts in the instant case in support of the question presented for review are essentially the same as reported by the District Court of Appeal, Fourth District in *Lee* v. *State*, supra.

> "The facts in the instant case show that the defendants requested a private line telephone, but were informed by the telephone company that no private line was then available and that they could obtain service only through a party line. The police department then arranged with the telephone company to have a telephone installed on the same party line. An automatic actuator and a tape recorder were attached to the telephone on the party line and recordings were made over a period of some eight days of conversations of the defendants on their telephone on the same party line. The recordings of these conversations were admitted in evidence."

ARGUMENT

It is the contention of the petitioners that evidence of tape recordings of telephone conversations on a party line as a result of a conspiracy between the Winter Park Telephone Company and the local police officers to invade the privacy of the petitioners is no longer tolerable in view of 47 U.S.C. § 605, Federal Communications Act.

The applicability of this statute to the instant case can be fully justified.

Petitioners further submit we are not unmindful of the decision of this Court in *Schwartz* v. *Texas*, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232. Nevertheless petitioners submit the limitations imposed in that decision are not applicable to the instant case. In the case of *Barber* v. *State*, 172 So.2d, 857 (Fla. App. 1965) decided by the First District Court of Appeals, the Court stated:

> *"The rule in Florida accords with the Federal Rule which on the authority of Section 605 of the Federal Communications Act (47 U.S.C.A. § 605) commonly known as the 'wiretapping statute'*, excludes such testimony unless obtained with the *knowledge* or *consent* of at least one of the conversants and as seen from the Griffith case, is predicated on Sections 12 and 22, Declaration of Rights, Constitution of Florida, F.S.A." (Emphasis supplied)

In view of the premises of this Florida Appellate Court, petitioners submit that the facts of the instant case may be decided in accordance with the decisions interpreting 47 U.S.C. § 605, rendered by this Court and other Federal Courts. In the alternative the petitioners further request this Court to review the limitations in *Schwartz* v. *Texas*, supra, to state court proceedings in light of the recent decisions of this Court. It should be noted that in this Court's decision in *Schwartz* the Court noted the Texas statute which provided that evidence obtained in violation of the Constitution or laws of Texas or the *Constitution* of the United States should be inadmissible in evidence. The Florida Constitution under the Declaration of Rights, Section Two, states that ". . . the paramount allegiance of every citizen is due to the Federal Government . . ." Certainly the Congress of the United States is an integral part of the Federal Government contemplated by the Florida Constitution. Therefore it is submitted that, by this avenue, that 47 U.S.C. § 605

is applicable to the instant case and that the statutory restrictions that confronted this Court in *Schwartz* are not applicable to the instant case. It is therefore the petitioners contention that by virtue of the case of *Barber* v. *State*, supra, wherein that Court stated that 47 U.S.C. § 605 is, in essence, the rule in Florida and the provision of the Florida Constitution whereby the citizens of this state have a paramount allegiance to the Federal Government, the instant case may be decided by this Court in accordance with the Federal decisions as to the admissibility of evidence received in a Florida state court in violation of 47 U.S.C. § 605.

Upon the facts of the instant case as stated by the Fourth District Court of Appeals in *Lee* v. *State*, 191 So.2d 84 (Fla. App. 1967), it is clear that after the petitioner Lee had requested a private line, the police conspired with the Winter Park Telephone Company to place the petitioner Lee on a party line and thereby secured evidence of telephone conversations with the other petitioners here, Brecheen and Merritt, as well as others, without the consent or knowledge of any subscriber or party thereto. The police were mere intruders and trespassers. In the recent case of *United States* v. *Pasha*, 332 F.2d 193 (1964), the Seventh Circuit Court of Appeals stated:

> "*. . . interception connotes a situation in which by surreptitious means a third party overhears a telephone conversation between two persons . . .*" (Emphasis supplied)

In an earlier case Judge Learned Hand stated in *United States* v. *Polakoff*, 112 F.2d 888 (2nd Cir. 1940), as follows:

> "The statute (§ 605, 47 U.S.C.A.) does not speak of physical interruption of the circuit, or of 'taps' *it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the com-*

municants do not consent; the means he employs can have no importance; it is the breach of privacy that counts." (Emphasis supplied)

Another very recent case applying the same disdain for the technical niceties is *United States* v. *Laughlin*, 1963, 223 F. Supp. 623, which held that recordings obtained through the use of an induction coil with the consent of one of the parties were not admissible. In a very forceful opinion, it was said:

> "To interpret the Federal Communications Act as meaning that a third party who can record a whole conversation on tape is not an *interception* does not, in my opinion, make sense for it is destructive of personal liberty. All this highly technical language to the effect that a mechanical device or an electronic device or an induction coil not directly attached to a telephone or a telephone line, but that is capable of recording a while conversation between the parties, is not an '*interception*' is sheer nonsense. *The Courts should meet the issue squarely and should not attempt to make technical distinctions between the mechanical methods used.* What difference does it make whether a tapped wire records a conversation and an induction coil or other mechanical device does the same thing? *To say that there is a difference is a sham and an illusion.* * * * It follows therefore, that *where a conversation is recorded, regardless of the methods or the means used, without the consent of one of the parties*, the right of privacy has been violated." (Emphasis added)

The scope of the Federal Communications Act is fully set forth in this Court's decision in *Benanti* v. *United States*, 355 U.S. 96, 2 L. ed. 2d, 126, 78 S. Ct. 155 (1957), wherein Chief Justice Warren stated:

> "The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under § 605, that portion of the statute pertinent to

> this case applies both to intrastate and to interstate communications. (citing Weiss v. United States, 308 U.S. 321, 84 L. ed. 298, 60 S. Ct. 269). The natural result of respondent's argument is that both interstate and intrastate communication would be removed from the statute's protection because, as this Court noted in Weiss, the interceptor cannot discern between the two and will listen to both. Congress did not intend to place the protections so plainly guaranteed in § 605 in such a vulnerable position."

After considering other grants of authority delegated to the state under Title 47 U.S.C., the Court went on to say:

> "Moreover, the very existence of these grants of authority to the States underscores the conclusion that *had Congress intended to allow the States to make exceptions to § 605 it would have said so.*" (Emphasis supplied)

In view of this decision petitioners submit that a state court should be in no better position to thwart the "broader policy considerations motivating § 605" than a State legislature, since this Court has stated the Act applies to interstate and intrastate communications. Moreover the Legislature of Florida has enacted Section 822.10, Florida Statutes, F.S.A. which upon a bare reading embraces the proscriptions set forth in § 605.

From a reading of the concurring opinion of Chief Justice Warren in *Lopez* v. *United States*, 373 U.S. 427, 10 L. ed. 2d 467, 83 S. Ct. 1381 (1963) wherein he denounces the *Olmstead* case as well as the line of decisions that followed (Goldman v. United States, 316 U.S. 129, 86 L. ed. 1322, 62 S. Ct. 993, *On Lee* v. *United States*, 343 U.S. 747, 96 L. ed. 1270, 72 S. Ct. 967), it is submitted that the convictions of the petitioners should be reversed, without the application of 47 U.S.C. § 605, but by a profound emphasis of the "inviolate personal liberties" protected by the Fourth Amendment. In every day

talk, as of 1789, a man 'searches' when he looks or listens." We should be mindful of the development of the law, whether federal or state, without regard for the technical niceties that can illogically demonstrate a distinction without a difference when fundamental liberties of the organic law are being extinguished by logical solecisms.

Nine years after the decision in *Schwartz* v. *Texas*, supra this Court delivered its decision in *Mapp* v. *Ohio*, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684, wherein the Court stated:

> "Since the Fourth Amendment's right to privacy has been declared enforceable against the States through the due process clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.

The Court stated furthermore:

> "The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as 'basic to a free society'.
>
> After noting the constitutional rights protected by this Court when enforced against the State as well as the Federal Government this Court in *Mapp* through Mr. Justice Clark posed the question 'Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?' By the same token why should this Court sanction a conspiracy to invade the right to privacy of the petitioners by a telephone company and local police officers? The question bespeaks of the unsoundness of the *Schwartz* decision wherein the Court has sanctioned a 'state rule of evidence' while completely ignoring the constitutional right to privacy which it seeks to protect in *Mapp*. The gravamen of the violation of the right to privacy protected by the Fourth

> Amendment in the instant case becomes aggravated and accentuated by the conspiracy to do it."

The inherent dangers in electronic eavesdropping and wiretapping has received virtual condemnation from many courts, including this one, in recent cases. For example see the able dissenting opinion of Judge Rawls in *Barber* v. *State*, 172 So.2d 857, and from this Court the forceful dissenting opinion of Mr. Justice Brennan with whom Mr. Justice Douglas and Mr. Justice Goldberg in *Lopez* v. *United States*, supra, wherein Mr. Justice Brennan gave vent not only to the dangers of electronic surveillance but to the growing enormity of the problem. There is great solace in the words of Mr. Justice Brennan where he stated in *Lopez* (10 L. ed. 2d 485):

> "The requirements of the Fourth Amendment are not technical or unreasonably stringent; they are the bedrock rules without which there would be no effective protection of the right to personal liberty. A search for mere evidence offends the fundamental principle against self-incrimination, as Lord Camden clearly recognized; a merely exploratory search revives the evils of the general warrant, so bitterly opposed by the American Revolutionaries; and without some form of notice, police searches became intolerable intrusions into the privacy of home or office. Electronic searches cannot be tolerated in the name of law enforcement if they are inherently unconstitutional."

If the Legislative policy of New York is not paramount to the "broader policy considerations that motivated § 605" as stated in the *Benanti* case, by the same token is a state court decision entitled to more latitude by substituting a "state rule of evidence" for the constitutional right to privacy recognized by this Court in the *Mapp* case.

In the case of *Shelley* v. *Kraemer*, 433 U.S. 1, 92 L. ed. (Adv. 845), 68 S. Ct. 836, 3 ALR 2d 441, decided whether a state court may enforce private agreements, gen-

erally described as restrictive covenants which have as their purpose to exclude ownership or occupancy of real property on grounds of race or color. The Supreme Court of the United States held that the state court could not enforce such an agreement and stated in support thereof:

> "But the examples of state judicial action which have been held by this Court to violate the Amendments commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. *It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment.*" (Emphasis added)

Though the facts in the case at bar are different, nevertheless the Courts of this State have enforced agreements by police officers with the telephone companies to conduct surveillances of party line subscribers which they could not do if only private lines were in existence. This is manifestly a denial of the equal protection of the laws.

The corollary of the party line holder is obvious. If the police were to arrange with the telephone company, as the Fourth District Court of Appeal concluded they did in the instant case, to set up an extension on a private line and make tape recordings of telephone conversations, the conclusion is inescapable that such conversations would not be admitted into evidence. The net result is that those persons having a private line carry the immunities of the law without the burdens. Conversely those individuals who have a proprietory interest in a party line, as stated on the Barber case, must carry the burdens of eavesdropping at any time by police officials pursuant to their agreements with the telephone companies, without the equal protection of the law enjoyed by the private line holders. This is manifestly a discriminatory policy without any rational basis. As such it is predicated on the unavailability of private lines or economic feasibility of a poor

person to afford only a party line. If such a discriminatory policy remains in force, we are indirectly committed to the proposition that we are a government of men, not a government of laws.

Such distinctions are no longer tolerable if the recent decisions of this Court are to have force and reason and not be reduced to a 'form of words' *Mapp* v. *Ohio*, supra. It is therefore the contention of petitioners that *Schwartz* should briefly be revisited and briskly departed therefrom. *Schwartz* is no longer reconcilable with the reasoning in *Mapp* nor the dictum, as previously stated, in *Benanti*. It is undetermined at this point how many party lines exist in Florida or in the nation. But if conspiracies that are present in the facts of this case are permitted to continue, *Schwartz* will stand as nothing more than an "open-door" policy to flagrant violations of the right to privacy. Convictions obtained in violation of the legislative mandate and the organic law of the state and the nation can no longer be written off as a preference for a rule of evidence. The history and decision of this Court will not justify such a conclusion.

CONCLUSION

For the aforesaid reasons and authorities, petitioners respectfully request this Court to grant certiorari.

/s/ Edward R. Kirkland
EDWARD R. KIRKLAND, OF
KIRKLAND, JOHNSON & BLALOCK
Suite 104, 22 W. Lake Beauty Dr.
Orlando, Florida

Attorney for Petitioners

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IN THE CRIMINAL COURT OF RECORD, of the County of Orange and the State of Florida, in the year of our Lord one thousand nine hundred and sixty-four.

STATE OF FLORIDA

v.

HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS, CLYDE FRANKLIN LEE, alias J. MARTIN alias JACK MARTIN, DOROTHEA HOWELL RADFORD, CECIL ST. CLAIR MERRITT, GLEN DULIN BRECHEEN, KATHRYN BRADSHAW, MACON TRIBUE, and GERTRUDE LOCKE

INFORMATION FOR

(1) CONSPIRACY

(2) LOTTERY LAW VIOLATIONS

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA

JAMES M. RUSS, County Solicitor, for the County of Orange, prosecuting for the State of Florida, in the said County, under oath, charges that HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS, CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, DOROTHEA HOWELL RADFORD, CECIL ST. CLAIR MERRITT, GLEN DULIN BRECHEEN, KATHRYN BRADSHAW, MACON TRIBUE and GERTRUDE LOCKE, in Orange County, Florida, Seminole County, Florida, Polk County, Florida, and divers other places unknown to the Solicitor, on July 27, 1963, and on divers and sundry times and occasions thereafter between July 27, 1963, and August 10, 1963, inclusive, in violation of Section 833.04, Florida Statutes, did unlawfully agree, conspire, combine, and confederate with one another and together, and with the following persons who are co-con-

spirators but not defendants: a certain male person called "Lewis" utilizing Haines City, Florida, telephone numbered 422-4092 who is believed to be named "Willie Lewis"; William Brown alias Fox; a certain male person called "Honey" utilizing Sanford, Florida, telephone numbered 323-0439 who is believed to be named "Willie Dubose"; a certain female person utilizing Sanford, Florida, telephone numbered 323-0439 who is believed to be named "Emily Mae Dubose"; a certain male person utilizing Orlando, Florida, telephone numbered 423-2867 who is believed to be named "Johnnie L. Brown"; and a certain female person utilizing Orlando, Florida, telephone numbered 423-2867 who is believed to be named "Louise Brown"; a more particular and exact identification of said co-conspirators being unknown to the Solicitor, to commit the felonies of promoting and conducting a lottery for money, and the felonies of aiding and assisting in the promoting and conducting of a lottery for money in the following manner:

A. By equipping and maintaining check-up houses at various locations in Orange County, Florida, Seminole County, Florida, and divers other places unknown to the Solicitor, in connection with and support of a lottery for money commonly known as "Bolita", "Cuba" and "Bond" during the time period between July 27, 1963, and August 10, 1963, inclusive.

B. By transmitting betting information and equipment connected with a lottery for money commonly known as "Bolita", "Cuba" and "Bond" among writers or sellers, pick-up men, check-up house operators, and the banker in Orange County, Florida, Seminole County, Florida, Polk County, Florida, and divers other places unknown to the Solicitor, during the time period between August 2, 1963, and August 10, 1963, inclusive.

C. By transmitting the results on a lottery for money commonly known as "Bolita", "Cuba" and "Bond"

among writers or sellers, pick-up men, check-up house operators, and the banker in Orange County, Florida, Seminole County, Florida, Polk County, Florida, and divers other places unknown to the Solicitor, during the time period between August 2, 1963, and August 10, 1963, inclusive.

D. By servicing a group of writers or sellers of lottery tickets and shares and rights in a lottery scheme, the aforesaid lottery being for money and commonly known as "Bolita", "Cuba" and "Bond", in Orange County, Florida, Seminole County, Florida, Polk County, Florida, and divers other places unknown to the Solicitor, during the time period between August 2, 1963, and August 10, 1963, inclusive.

COUNT TWO

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS, CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, DOROTHEA HOWELL RADFORD, CECIL ST. CLAIR MERRITT, GLEN DULIN BRECHEEN, KATHRYN BRADSHAW, MACON TRIBUE and GERTRUDE LOCKE, on July 27, 1963, and on divers and sundry times and occasions thereafter between July 27, 1963, and August 10, 1963, inclusive, in Orange County, Florida, Seminole County, Florida, Polk County, Florida, and divers other places unknown to the Solicitor, did unlawfully promote a lottery for money commonly known as "Bolita", "Cuba" and "Bond".

COUNT THREE

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS, CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, DOROTHEA HOWELL RAD-

FORD, CECIL ST. CLAIR MERRITT, GLEN DULIN BRECHEEN, KATHRYN BRADSHAW, MACON TRIBUE and GERTRUDE LOCKE, on July 27, 1963, and on divers and sundry times and occasions thereafter between July 27, 1963, and August 10, 1963, inclusive, in Orange County, Florida, Seminole County, Florida, Polk County, Florida, and divers other places unknown to the solicitor, did unlawfully conduct a lottery for money commonly known as "Bolita", "Cuba" and "Bond".

COUNT FOUR

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS, CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, DOROTHEA HOWELL RADFORD, CECIL ST. CLAIR MERRITT, GLEN DULIN BRECHEEN, KATHRYN BRADSHAW, MACON TRIBUE and GERTRUDE LOCKE, on July 27, 1963, and on divers and sundry times and occasions thereafter between July 27, 1963, and August 10, 1963, inclusive, in Orange County, Florida, Seminole County, Florida, Polk County, Florida, and divers other places unknown to the Solicitor, did unlawfully aid and assist in the promoting of a lottery for money commonly known as "Bolita", "Cuba" and "Bond".

COUNT FIVE

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS, CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, DOROTHEA HOWELL RADFORD, CECIL ST. CLAIR MERRITT, GLEN DULIN BRECHEEN, KATHRYN BRADSHAW, MACON TRIBUE and GERTRUDE LOCKE, on July 27, 1963, and on divers and sundry times and occasions thereafter be-

tween July 27, 1963, and August 10, 1963, inclusive, in Orange County, Florida, Seminole County, Florida, Polk County, Florida, and divers other places unknown to the Solicitor, did unlawfully aid and assist in the conducting of a lottery for money commonly known as "Bolita", "Cuba" and "Bond".

COUNT SIX

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN and DOROTHEA HOWELL RADFORD, on August 10, 1963, in Orange County, Florida, were then and there unlawfully interested in and connected with a lottery for money commonly known as "Bolita", "Cuba" and "Bond", by then and there unlawfully having in their possession implements and devices connected with said lottery, to wit: adding machines, a radio, currency of the United States of America, a telephone, pads of paper, pencils, money wrappers, stapler, and paper clips.

COUNT SEVEN

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN and DORETHEA HOWELL RADFORD, on August 10, 1963, in Orange County, Florida, did unlawfully have in their possession implements and devices for conducting a lottery for money commonly known as "Bolita", "Cuba" and "Bond", to wit: adding machines, a radio, currency of the United States of America, a telephone, pads of paper, pencils, money wrappers, stapler, and paper clips.

COUNT EIGHT

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that

HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS, CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, CECIL ST. CLAIR MERRITT, KATHRYN BRADSHAW and GERTRUDE LOCKE, on August 2, 1963, in Orange County, Florida, Seminole County, Florida, Polk County, Florida, and divers other places unknown to the Solicitor, did then and there unlawfully and knowingly use private wires, to wit: telephones, in the dissemination of information concerning a lottery for money commonly known as "Bolita", "Cuba" and "Bond", in furtherance of gambling and for gambling purposes.

COUNT NINE

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, CECIL ST. CLAIR MERRITT, GLEN DULIN BRECHEEN, and KATHRYN BRADSHAW, on August 5, 1963, in Orange County, Florida, Seminole County, Florida, and divers other places unknown to the Solicitor, did then and there unlawfully and knowingly use private wires, to wit: telephones, in the dissemination of information concerning a lottery for money commonly known as "Bolita", "Cuba" and "Bond", in furtherance of gambling and for gambling purposes.

COUNT TEN

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, CECIL ST. CLAIR MERRITT, and GLEN DULIN BRECHEEN on August 6, 1963, in Orange County, Florida, Seminole County, Florida, and divers other places unknown to the Solicitor, did then and there unlawfully and knowingly use private wires, to wit: telephones, in the dissemination of information concerning a

lottery for money commonly known as "Bolita", "Cuba" and "Bond", in furtherance of gambling and for gambling purposes.

COUNT ELEVEN

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS, CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, CECIL ST. CLAIR MERRITT, and GLEN DULIN BRECHEEN, on August 7, 1963, in Orange County, Florida, Seminole County, Florida, and divers other places unknown to the Solicitor, did then and there unlawfully and knowingly use private wires, to wit: telephones, in the dissemination of information concerning a lottery for money commonly known as "Bolita", and "Bond", in furtherance of gambling and for gambling purposes.

COUNT TWELVE

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS, CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN, CECIL ST. CLAIR MERRITT and GLEN DULIN BRECHEEN on August 8, 1963, in Orange County, Florida, Seminole County, Florida, and divers other places unknown to the Solicitor, did then and there unlawfully and knowingly use private wires, to wit: telephones; in the dissemination of information concerning a lottery for money commonly known as "Bolita" and "Bond", in furtherance of bambling and for gambling purposes.

COUNT THIRTEEN

And your Solicitor prosecuting for the State of Florida in the County of Orange, under oath, further charges that

CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN and CECIL ST. CLAIR MERRITT on August 10, 1963; in Orange County, Florida, and divers other places unknown to the Solicitor, did then and there unlawfully and knowingly use private wires, to wit: telephones, in the dissemination of information concerning a lottery for money commonly known as "Cuba", in furherance of gambling and for gambling purposes, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

/s/ James M. Russ
County Solicitor,
Orange County, Florida

State of Florida
County of Orange

Personally appeared before me, JAMES M. RUSS, County Solicitor for Orange County, Florida, who, being first duly sworn, says the allegations, as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office this 6th day of February, A.D. 1964.

/s/ Leon Tschiedel
Notary Public, State of Florida at Large. My Commission expires January 19, 1968.

DIRECT

No. 96864

DIVISION B

CRIMINAL COURT OF RECORD
ORANGE COUNTY

STATE OF FLORIDA

THE STATE OF FLORIDA

v.

HARLAN ALEXANDER BLACKBURN alias THOMAS DAVIS; CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN; DOROTHEA HOWELL RADFORD; CECIL ST. CLAIR MERRITT; GLEN DULIN BRECHEEN; KATHRYN BRADSHAW; MACON TRIBUE and GERTRUDE LOCKE

INFORMATION FOR

(1) CONSPIRACY

(2) LOTTERY LAW VIOLATIONS

[Filed in Office, Criminal Court of Record and County Court, Orange Co., Fla., Feb. 6, 4:51 P.M., '64, Chas. E. Limpus, Clerk]

State of Florida
County of Orange

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for the County and State aforesaid, certify that this paper is a true and correct copy of the original information filed in my office in the case of the State of Florida vs. .....

. IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office this ..... day of ....., ... A.D. 19.....

CHAS. E. LIMPUS
Clerk of the Criminal Court of Record.

By ..... D. C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

Case No. 96864

Charge: Count One: Conspiracy

STATE OF FLORIDA

v.

CLYDE FRANKLIN LEE alias J. MARTIN, alias JACK MARTIN

Now on this day came in person the Defendant Clyde Franklin Lee in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Clyde Franklin Lee, having been tried and convicted at this term of court to the crime of Conspiracy as charged in the first Count ..... of the Information, the

Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgment, order and sentence of the Court that you, Clyde Franklin Lee, for the crime of which you have been and stand convicted, as charged in the first Count ..... of the Information, be imprisoned by confinement at hard labor for ONE (1) YEAR in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon CLYDE FRANKLIN LEE, in Case No. 96864, as recorded in Minute Book No. 2, Page 5, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS,
Clerk of Criminal Court of Record

By: ..... D. C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

Case No. 96864

Charge: Count Five: Violation of Lottery Law

STATE OF FLORIDA

v.

CLYDE FRANKLIN LEE alias J. MARTIN,
alias JACK MARTIN

Now on this day came in person the Defendant Clyde Franklin Lee in open Court, and having been asked by

the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Clyde Franklin Lee, having been tried and convicted at this term of court to the crime of Violation of Lottery Law as charged in the fifth Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgment, order and sentence of the Court that you, Clyde Franklin Lee, for the crime of which you have been and stand convicted as charged in the fifth Count ..... of the Information, be imprisoned by confinement at hard labor for FIVE (5) YEARS in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon CLYDE FRANKLIN LEE, in Case No. 96864, as recorded in Minute Book No. 2, Page 5, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS,
Clerk of Criminal Court of Record

By: ..... D. C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

Case No. 96864

Charge: Count One: Conspiracy

STATE OF FLORIDA

v.

CECIL ST. CLAIR MERRITT

Now on this day came in person the Defendant Cecil St. Clair Merritt in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Cecil St. Clair Merritt, having been tried and convicted at this term of court to the crime of Conspiracy as charged in the first Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgment, order and sentence of the Court that you, Cecil St. Clair Merritt, for the crime of which you have been and stand convicted, as charged in the first Count ..... of the Information, be imprisoned by confinement at hard labor for ONE (1) YEAR in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon CECIL ST. CLAIR

MERRITT, in Case No. 96864, as recorded in Minute Book No. 2, Page 5 and 6, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS,
Clerk of Criminal Court of Record

By: ..... D. C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

Case No. 96864

Charge: Count Five: Violation of Lottery Law

STATE OF FLORIDA

v.

CECIL ST. CLAIR MERRITT

Now on this day came in person the Defendant Cecil St. Clair Merritt in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Cecil St. Clair Merritt, having been tried and convicted at this term of court to the crime of Violation of Lottery Law as charged in the fifth Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgment, order and sentence of the Court that you, Cecil St. Clair Merritt, for the crime of which you have been and stand convicted, as charged

in the fifth Count ..... of the Information, be imprisoned by confinement at hard labor for THREE (3) YEARS in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon CECIL ST. CLAIR MERRITT, in Case No. 96864, as recorded in Minute Book No. 2, Page 5 and 6, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS,
Clerk of Criminal Court of Record

By: ..... D. C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

Case No. 96864

Charge: Count One: Conspiracy

STATE OF FLORIDA

v.

GLEN DULIN BRECHEEN

Now on this day came in person the Defendant Glen Dulin Brecheen in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Glen Dulin Brecheen, having been tried and convicted at this term of court to the crime of Conspiracy as charged in the first Count ..... of the Information,

the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgment, order and sentence of the Court that you, Glen Dulin Brecheen, for the crime of which you have been and stand convicted, as charged in the first Count ..... of the Information, be imprisoned by confinement at hard labor for ONE (1) YEAR in the state Penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon GLEN DULIN BRECHEEN, in Case No. 96864, as recorded in Minute Book No. 2, Page 5 and 6, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS,
Clerk of Criminal Court of Record

By: ..... D. C.

CERTIFIED COPY OF JUDGMENT AND SENTENCE OR ORDER OF ESTREATURE

Case No. 96864

Charge: Count Five: Violation of Lottery Law

STATE OF FLORIDA

v.

GLEN DULIN BRECHEEN

Now on this day came in person the Defendant Glen Dulin Brecheen in open Court, and having been asked by

the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, Glen Dulin Brecheen, having been tried and convicted at this term of court to the crime of Violation of Lottery Law as charged in the fifth Count ..... of the Information, the Court adjudges you to be Guilty of said crime, as charged in said Count ..... of the Information.

It is, therefore, the judgment, order and sentence of the Court that you, Glen Dulin Brecheen, for the crime of which you have been and stand convicted, as charged in the fifth Count ..... of the Information, be imprisoned by confinement at hard labor for THREE (3) YEARS in the state penitentiary.

I, CHAS. E. LIMPUS, Clerk of the Criminal Court of Record in and for Orange County, Florida, do hereby certify that the above is a true and correct copy of Judgment and Sentence imposed upon GLEN DULIN BRECHEEN, in Case No. 96864, as recorded in Minute Book No. 2, Page 5 and 6, on July 21st, A.D., 1964.

WITNESS my hand and official seal this ..... day of ....., A.D., 19.....

CHAS. E. LIMPUS,
Clerk of Criminal Court of Record

By: ..... D. C.

IN THE CRIMINAL COURT OF RECORD
IN AND FOR ORANGE COUNTY, FLORIDA

Information No.

STATE OF FLORIDA,
Plaintiff,

v.

CLYDE FRANKLIN LEE, GLEN BRECHEEN, CECIL MERRITT,
Defendants.

MOTION FOR NEW TRIAL

Comes now the defendants jointly and severally and move the Court to grant each of them a new trial and for grounds therefore say:

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the law.

3. The Court erred in denying defendants motion for a mis-trial during the progress of the trial.

4. The Court erred in denying Defendants motion for directed verdict.

5. As to the defendant CLYDE FRANKLIN LEE, the Court erred in admitting the articles taken from the defendant CLYDE FRANKLIN LEE at the time he was arrested at 411 Manor Road.

6. The Court erred in admitting the testimony of the several witnesses who testified concerning conversations overheard on the telephone.

7. As to the defendants GLEN BRECHEEN AND CECIL MERRITT, no testimony was offered that their alleged conversations were had with the defendant CLYDE FRANKLIN LEE within the jurisdiction of this Court.

8. As to the defendants GLEN BRECHEEN and CECIL MERRITT, the State failed to prove venue.

9. The Court erred in admitting evidence seized at 411 Manor Road on grounds that it was taken as a result of unlawful, unreasonable search and seizure and for such other and further grounds as a reading of the transcript of record will reveal.

WHEREFORE, Defendants respectfully move the Court to grant the Motion for New Trial.

/s/ Edward R. Kirkland
EDWARD R. KIRKLAND
140 South Court Street
Orlando, Florida
Attorney for Defendants

I HEREBY CERTIFY that copy hereof has been furnished to Hon. James Russ, County Solicitor, Orange County, Orlando, Florida, this 2nd day of July, 1964.

/s/ Edward R. Kirkland
Attorney

FILED:
July 2nd, 1964
CHAS. E. LIMPUS, CLERK

IN THE CRIMINAL COURT OF RECORD
IN AND FOR ORANGE COUNTY, FLORIDA

Case No. 96864

STATE OF FLORIDA,
Plaintiff,

v.

CLYDE FRANKLIN LEE alias J. MARTIN alias JACK MARTIN; GLEN DULIN BRECHEEN; CECIL ST. CLAIR MERRITT,
Defendants.

ORDER

A Motion for New Trial on behalf of EACH Defendant having been filed herein on July 2nd, 1964, by Counsel for Defense, said Motion came on at this time to be heard. Upon Stipulation of Counsel for State and Counsel for Defendants, it was Ordered that Paragraph # 3 of said Motion be, and it is hereby, amended by substituting the word "mis-trial" for the words, "new trial". Following arguments, the Motion was Denied as to EACH Defendant.

Entered in Minute Book No. 2,
Page No. 5, this the 21st day
of July, A.D., 1964.

IN THE CRIMINAL COURT OF RECORD
IN AND FOR ORANGE COUNTY, FLORIDA

Information No. 96864

STATE OF FLORIDA,
Plaintiff,

v.

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN,
CECIL ST. CLAIR MERRITT,
Defendants.

ASSIGNMENT OF ERRORS

Come now the above named defendants and say that there is manifest error in the records, proceedings, verdict and judgment of the lower court in regard to defendants' trial in this, to-wit:

1. The Court erred in denying defendants' Motion for New Trial.

2. The Court erred in denying defendants' Motion for Directed Verdict.

3. The Court erred in admitting testimony of the various witnesses concerning evidence obtained by interception or tapping of the line of the defendant Clyde Franklin Lee.

4. The Court erred in denying defendants' Motion for Mis-trial.

5. The Court erred in admitting the evidence obtained as the result of a search of the premises occupied by the defendant Clyde Franklin Lee.

6. The Court erred in admitting into evidence certain articles seized as the result of unreasonable and unlawful search and seizure which said articles were not contra-

band and were purely personal papers and effects of the defendant Clyde Franklin Lee.

7. The Court erred in admitting testimony of various witnesses concerning voice identification of the defendants on the grounds that said testimony was based upon and obtained as the result of an unlawful and unreasonable search and seizure and contrary to the defendants rights under the Constitution of the United States and Declaration of Rights of the State of Florida.

8. The Court erred in admitting each and every exhibit marked and filed as State's Exhibit.

WHEREFORE, the Defendants pray that the judgment and sentence may be reversed.

/s/ Edward R. Kirkland
EDWARD R. KIRKLAND
140 South Court Street
Orlando, Florida
Attorney for Defendants

I HEREBY CERTIFY that copy hereof has been furnished to Hon. James G. Horrell, County Solicitor, by mail, this 26th day of July, 1965.

/s/ Edward R. Kirkland
Attorney

FILED: July 26th, 1965
CHAS. E. LIMPUS, CLERK

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT

JULY TERM 1966

Case No. 36.

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

Received Sep. 22, 1966, Edward R. Kirkland, Attorney at Law

Opinion filed September 21, 1966.

Appeal from the Criminal Court of Record for Orange County; Walter N. Burnside, Jr., Judge.

Edward R. Kirkland of Kirland Johnson Smith & Ervin, Orlando, and William A. Harmening, Winter Park, for appellants.

Earl Faircloth, Attorney General, Tallahassee, and William D. Roth, Assistant Attorney General, Lakeland, for appellee.

FUSSELL, CARROLL W., Associate Judge.

Defendants appeal from their conviction for a violation of the lottery laws. Their principal contention is that the lower court committed an error in permitting taped recordings of a telephone conversation to be introduced into

evidence at the trial. They maintain that these recordings were the result of wiretapping and are illegal and inadmissible in evidence.

The law on wiretapping in Florida was most thoroughly and clearly stated by Judge Carroll in Griffith v. State, Fla.App.1959, 111 So.2d 282, which was later followed and re-affirmed in Barber v. State, Fla.App.1965, 172 So. 2d 857. Certiorari was denied by the Supreme Court in each of these two cases.

In the Griffith case, supra, the court observed that under the common law and general rule wiretapped evidence was admissible, and that, in order to change this rule, either a state or federal statute would be required or there must be a state or federal constitutional inhibition or the court must determine that wiretapping was in violation of the general principle of law.

In the Griffth case, supra, it was further determined that there were no state or federal statutes applicable in Florida which would make wiretapping illegal and inadmissible in evidence, but that wiretapping is illegal in Florida because it does violate Section 12 of the Declaration of Rights of the Florida Constitution, which provides:

> "Section 12 . . . No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."

and also violated Section 22 of the Declaration of Rights of the Florida Constitution, which provides:

> "Section 22 . . . The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated . . . ."

The first case in Florida dealing with this subject was Perez v. State, Fla.1955, 81 So.2d 201, decided by the Supreme Court of Florida. In this case an informant purchased a lottery ticket over the telephone while an officer

listened over an extension phone. The court held that this was sufficient as a basis for the officer to make his application for a search warrant.

The next case was Williams v. State, Fla.App.1959, 109 So.2d 379, decided by the Second District Court of Appeal. In this case the sheriff rented a party line and the deputy sheriff listened and recorded the conversations of the defendant thereon. The defendant had been told that the party line was being rented by a colored family, and the defendant did not know that the sheriff had rented the line. Recorded evidence of these conversations was held admissible.

The next case was the Griffith case, supra, decided by the First District Court of Appeal. In this case the officer rented a party line and then fixed it so that he could attach a long line to it and walk around the room without standing by the telephone at all times. Under this arrangement there was no tapping sound which would give alarm to the defendant that his conversation was being listened to. This was held not to be an illegal wiretap, and the officer was permitted to testify.

The last case, Barber v. State, Fla.App.1965, 172 So.2d 857, was also decided by the First District Court of Appeal. In this case a tape recording of a telephone conversation of the defendant with the prosecuting witness was admitted in evidence over the objection of the defendant that it was the result of wiretapping. The prosecuting witness had told the prosecuting officers of prior conversations with the defendant and consented to their making recordings of this conversation by means of wires attached by the deputy sheriff to the prosecuting witness' telephone receiver. The recording was made without the defendant's knowledge or consent. The court held that this was not the result of wiretapping and was admissible in evidence.

The facts in the instant case differ only from the above cases in that defendants contend that the telephone com-

pany itself knew of the plan of the enforcement officers and arranged and assisted them in the preliminary stages toward making the recordings. The facts in the instant case show that the defendants requested a private line telephone, but were informed by the telephone company that no private line was then available and that they could obtain service only through a party line. The police department then arranged with the telephone company to have a telephone installed on the same party line. An automatic actuator and a tape recorder were attached to the telephone on the party line and recordings were made over a period of some eight days of conversations of the defendants on their telephone on the same party line. The recordings of these conversations were admitted in evidence.

There appear to be no material distinguishing facts in the Williams, Griffith and Barber cases, above cited, from those in the instant case, and it is this court's opinion that these cases are controlling.

The appellants seek to obtain solace in the able dissenting oponion of Judge Rawls in the Barber case, supra. However, it is the duty of the courts to finally determine and to settle close legal questions, even though as often is the case, there are able conflicting views. The Florida courts have held, and rightly so in our opinion, that recordings of telephone conversations made with the consent of one of the parties to the conversation, either over a direct line or by extension, are legal and properly admissible in evidence. Also, that recordings made over a party line, where the conversant must or should know that his conversation can be heard over any of the other party lines, where there has been no direct tapping or invasion of the lines belonging exclusively to the defendant, then recordings made through the party lines are not illegal and are admissible in evidence.

Defendants in this case further object to the introduction in evidence of certain personal property items ob-

tained as results of the search of a residence. It is the contention of the defendants that the search was not executed in accordance with the law. Appellee contends that this objection comes too late as there was no motion to suppress prior to the trial and that it cannot now be raised on appeal, citing in support thereof Robertson v. State, 1927, 94 Fla.770, 114 So. 534, and Moffett v. State, Fla.App.1965, 179 So.2d 408. It does not appear, however, that these cases were called to the attention of the lower court and certain articles of personal property were first admitted in evidence. However, the court later reversed this ruling and excluded these articles from evidence and instructed the jury to disregard them.

It is, therefore, our opinion that under these facts no harmful error has occurred, and the judgment appealed is affirmed.

SMITH, C.J., WALDEN, J., concur.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1967

Tuesday, January 31, 1967

Case No. 35,888

CLYDE FRANKLIN LEE, ET AL.,
Petitioners,

v.

STATE OF FLORIDA,
Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Fourth District of Florida, in said cause bearing date September 21, 1966, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy
TEST:

/s/ Sid J. White
SID J. WHITE
Clerk Supreme Court

cc: Honorable Thomas Thatcher
Honorable Charles E. Limpus
Messrs. Kirkland, Johnson & Blalock
Honorable William D. Roth

Recieved Feb. 2, 1967, Edward R. Kirkland,
Attorney at Law

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1967

Thursday, February 23, A.D. 1967

Case No. 35,888

CLYDE FRANKLIN LEE, ET AL.,
Petitioners,

v.

STATE OF FLORIDA,
Respondent.

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A True Copy,

TEST:
/s/ Sid J. White
SID J. WHITE
Clerk Supreme Court

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ORDER OF JANUARY 31, 1967, IN THE ABOVE CAUSE)

SUPREME COURT

FILED
NOV 8 1967
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 174

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT, *Petitioners,*

v.

STATE OF FLORIDA, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Attorney General

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Assistant Attorney General

Counsel for the Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 174

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT, *Petitioners,*

v.

STATE OF FLORIDA, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The order of the Supreme Court of Florida denying petition for writ of certiorari dated January 31, 1967 is attached hereto as Exhibit A. Petition for rehearing in the same court was denied February 23, 1967. The opinion of the District Court of Appeal, Third District of Florida, which petitioners sought to have the Supreme Court of Florida review on certiorari is reported at 191 So.2d 84.

JURISDICTION

The order of the Supreme Court of Florida was entered on January 31, 1967. The petition for writ of certiorari was filed on May 19, 1967, and respondent was directed to file a response thereto by letter dated October 10, 1967. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

We believe that the question to be determined by this Court is properly stated as follows:

WHETHER THE ADMISSION IN EVIDENCE OF TAPE RECORDINGS OF TELEPHONE CONVERSATIONS ON A PARTY LINE VIOLATED PETITIONERS' RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT

The factual situation out of which these proceedings arose as reflected by the testimony adduced at the trial can be briefly outlined.

Donald Brown, an installer-repairman for the Winter Park Telephone Company, testified that he installed the telephone at the residence which the police used (Tt. V, p. 553). Brown related there was no special action taken with regard to the hooking up of the telephone (Tt. V, pp. 554-566). The telephone was on a four-party line and Brown testified that there was no

recording device hooked to the telephone when he installed it (Tt. V, p. 569). It will be noted that this telephone was installed on July 26, 1963.

The telephone which was installed on July 19, 1963, at the house which was occupied by the petitioners, was put in by one James D. Wheaton, who was an installer-repairman for the Winter Park Telephone Company. When Wheaton installed the telephone, he informed a person he later identified at the trial as petitioner Lee, that he was installing an R-4 (four-party line) instead of an R-1 (private line) (Tt. V, p. 542). Wheaton's testimony revealed that the installation of the party line was done in a routine manner (Tt. V, p. 541). Mr. Wheaton testified unequivocally that he informed Lee that the only line available was an R-4, or four-party line (Tt. V, pp. 544-549), and there was no contradictory testimony from petitioners.

Mr. Martin Nold, assignments supervisor for the Winter Park Telephone Company, testified that the telephones located at the residence of the petitioners and at the house rented by the police were both on the same party line (Tt. VI, p. 575). Nold testified that there were no private lines available in the area (Tt. VI, p. 577). Nold testified that he received verbal orders to try to put the telephone at 221 Manor Road (occupied by the police) on the same line with the telephone in the house which was occupied by the petitioners (Tt. VI, p. 578). Nold said, however, that it was coincidental that the telephone requested by the police was placed on the same party line with petitioners (Tt. VI, p. 584).

SUMMARY OF ARGUMENT

A. The order of the Florida Supreme Court is based upon

an adequate and independent non-federal ground and sufficiently so to support the judgment.

B. The Federal Communications Act (47 U.S.C., Section 605) is not applicable to proceedings in state courts. *Schwartz* v. *Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232.

C. The action of the state officers in listening in on a party line telephone conversation does not constitute an *interception* within the meaning and intendment of Section 605 of the Federal Communications Act. *Rathbun* v. *United States*, 355 U.S. 107, 2 L.Ed. 2d 134, 78 S.Ct. 161.

D. The state officers committed no trespass. There was no electronic surveillance to overhear conversations taking place within a "constitutionally protected area" see, e.g., *Silverman* v. *United States*, 365 U.S. 505, 510. The state officers did nothing more than what they had a right to do by picking up the receiver of a telephone installed at the premises rented by them and listening to a party line telephone conversation.

E. The dictates of common sense compel the conclusion that a telephone party line is not a "constitutionally protected area." Petitioners, by choosing to place calls from a party line telephone ran the risk that their words might be overheard by someone whose telephone was connected to the same party line. We say there is little, if any, basis for even suggesting that the degree of privacy which petitioners could reasonably expect to enjoy in a party line telephone conversation was comparable to that which they could expect (and demand) on a private line. See *Smayda* v. *United States*, 353 F.2d 251, 254-256 (C.A. 9) certiorari denied 382 U.S. 981.

ARGUMENT

WHETHER THE ADMISSION IN EVIDENCE OF TAPE RECORDINGS OF TELEPHONE CONVERSATIONS ON A PARTY LINE, VIOLATED PETITIONERS' RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Reasons for Declining to Grant the Writ of Certiorari Prayed for by Petitioners

There can be no doubt but that this Court has long followed its self-imposed principle that it will decline to review the judgment of a state court when said judgment is based upon an adequate and independent non-federal ground—without regard to whether a federal question was involved. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U.S. 45, 53; *Fox Film Corp.* v. *Muller*, 296 U.S. 207.

Just as certain is it correct to say that once it has been made apparent that the state court judgment in question is in fact based upon a non-federal ground, this Court must then determine whether that ground was in fact adequate to support the judgment without regard to any conclusion of the federal question which may have been involved. *Staub* v. *Baxley*, 355 U.S. 313, 318-319; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 455.

The adequacy referred to above is met if said ground is (a) broad enough, (b) independent and (c) tenable.

The matter of the scope of the non-federal ground is dis-

cussed in the *Murdock* case, supra, and as well in *Eustis* v. *Bolles*, 150 U.S. 361, 370.

The independence of said non-federal ground is discussed extensively in the cases of *Enterprise Irrig. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U.S. 157, 164; *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290.

In the case at bar, respondent vigorously contends that the action of the Florida Supreme Court sought to be assailed by petitioners was in every way based upon a non-federal ground, which ground was independent of any federal question, was broad enough without reference to the federal question and was so tenable as to almost require this Court to conclude that said ground was adequate and therefore decline to grant review thereof.

In accord with the above, this Court has consistently held that it is essential to show that not only must the state court's decision rest on a federal question, but it must also appear that a decision as to such question was necessary to the state court's determination. *De Saussure* v. *Gaillard*, 127 U.S. 216, 8 S.Ct. 1053, 32 L.Ed. 125 and *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191. See also annotations in 100 L.Ed. 1200, 1203 and 84 L.Ed. 925, 935, et seq.

Quite apart from the fact that the decision of the Supreme Court of the State of Florida denying petitioners' review by certiorari in nowise turned on or was concerned with either a federal question or an issue of federally assured due process, even if it had been so colored, it is axiomatic that this would not *per se* constitute a valid basis upon which petitioners could now complain. In this regard, the Court's attention is invited to its own pronouncements anent this matter. *Pierce* v. *Somerset Rail-*

way, 171 U.S. 641, 19 S.Ct. 64, 43 L.Ed. 316, *Leonard* v. *Vicksburg, Shreveport and Pacific Railroad Company*, 198 U.S. 416, 25 S.Ct. 750, 49 L.Ed. 1108, *Utley* v. *City of St. Petersburg, Florida*, 292 U.S. 106, 54 S.Ct. 593, 78 L.Ed. 1155; *Lynch* v. *New York ex rel. Pierson*, supra; *Brooks* v. *Missouri*, 124 U.S. 394, 8 S.Ct. 443, 31 L.Ed. 454; *Buck* v. *California*, 343 U.S. 99, 72 S.Ct. 502, 96 L.Ed. 775. See also annotations, 100 L.Ed. 1200, 1203-6; 84 L.Ed. 925, 940, et seq.

The basic pronouncements to be found in the immediately aforementioned decisions of this Court were brought forth and galvanized in the realm of criminal law by this Court's own recent decision in the case of *Durley* v. *Mayo*, 351 U.S. 277, 100 L.Ed. 1178, 76 S.Ct. 806, in which it concluded that the Florida Supreme Court, in denying the petitioner relief by habeas corpus, rested its decision on adequate state grounds; they being respectively statutory *res adjudicata* (Section 79.10, Florida Statutes) and substantive or case law *res adjudicata* (*Washington* v. *Mayo*, Fla. 77 So.2d 620, 621).

Nor need this Court consider that the Supreme Court of Florida might have rested its order of dismissal on an adequate state ground as was the case in *Durley* v. *Mayo*, supra. It may be categorically stated and respondent so does, that the order of the Supreme Court of Florida in question was in fact founded upon state grounds which are conclusively adequate.

In the instant proceedings, we need only concern ourselves with what is the highest form of law to which one can turn in the State of Florida; a constitutional provision, to wit: Article V, Section 4(2), the pertinent provisions of which read as follows:

"Section 4. Supreme Court

* * *

"(2) Jurisdiction

* * *

". . . The supreme court may review by certiorari any decision of a District Court of Appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the District Court of Appeal to be of great public interest, or that is in direct conflict with a decision of another District Court of Appeal or of the supreme court on the same point of law, . . ."

So it was that petitioners were faced with the constitutional requirement impressed upon them that required a specific assertion that either of the enumerated prerequisites occurred, supported by record evidence thereof, in order to secure review in the Florida Supreme Court by certiorari.

It should be clear that the decision of the District Court of Appeal of Florida, Fourth District, which petitioners sought to have reviewed by the Florida Supreme Court did not affect a class of constitutional or state officers. It should be equally clear that said decision did not pass upon a question certified by said District Court of Appeal to be of great public interest. Petitioners, however, did attempt to invoke the jurisdiction of the Florida Supreme Court by alleging that the decision of the Florida District Court of Appeal, Fourth District, in the case *sub judice* was in direct conflict with the decision of another District Court of Appeal. However, the Florida Supreme Court by entry of its order dated January 31, 1967, denying petition for writ of certiorari said, in effect, that it did not have jurisdiction to review the decision of the said District Court of Appeal by certiorari.

In view of the foregoing, it becomes apparent that the order of the Florida Supreme Court that petitioners seek to have this Court review was indeed based upon the adequate and independent non-federal ground, to wit: lack of jurisdiction.

The law of wire tapping in Florida was most thoroughly and clearly set forth in the opinion of the Florida District Court of Appeal, First District, in the case of *Griffith* v. *State*, Fla. App. 1959, 111 So.2d 282, which was later followed and re-affirmed in *Barber* v. *State*, Fla. App. 1965, 172 So.2d 857. The Florida Supreme Court denied certiorari in both of these cases.

In the *Griffith* case, supra, it was pointed out that although there were no state or federal statutes applicable in Florida which would make wire tapping illegal, that wire tapping is illegal in Florida because it violates Sections 12 and 22 of the Declaration of Rights of the Florida Constitution, which provide:

> "Section 12 . . . No person shall be . . . compelled in any criminal case to be a witness against himself . . ."

> "Section 22 . . . The right of the people to be secure in their persons, house, papers and effects against unreasonable seizures and searches, shall not be violated . . ."

Certainly the holding in the *Griffith* case, supra, that there was no federal statute applicable in Florida which would make wire tapping illegal is in harmony with previous pronouncements of

this Court. We refer particularly to the holding of this Court in *Schwartz* v. *Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232. There the petitioner contended that Section 605 of the Federal Communications Act, (47 U.S.C. Section 605) rendered inadmissible in evidence the records of intercepted telephone conversations without petitioner's consent. This Court recognized that it was dealing only with the application of a federal statute to state proceedings and held as follows:

> "We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings . . ."

We believe that this Court's holding as above set forth is controlling and, therefore, obviates the necessity of determining whether or not there was an "interception" within the meaning of Section 605 of the Federal Communications Act.

Petitioners seem to be of the opinion that this Court's decision in *Benanti* v. *United States*, 355 U.S. 96, 2 L.Ed. 2d 126, 78 S.Ct. 155, supports their contention that the Federal Communications Act (47 U.S.C. Section 605) is applicable to state court proceedings. We do not so read the case. In *Benanti*, this Court simply held that information obtained and divulged by state agents in violation of Section 605 of the Federal Communications Act is inadmissible in federal court. Obviously, this Court had to first determine whether or not there had been a violation of the Federal Communications Act before being able to rule on the admissibility of the information sought to be introduced in evidence in federal court. We cannot understand how this holding can be construed as making the Federal Communications Act applicable to state court proceedings.

But should this Court seek to determine whether the state agents violated Section 605 of the Federal Communications Act in the case *sub judice*, the case of *Rathbun* v. *United States*, 355 U.S. 107, 2 L.Ed. 2d 134, 78 S.Ct. 161, is informative. In *Rathbun*, the petitioner telephoned one Sparks in the early morning hours and two police officers at Sparks' direction listened to the conversation over a telephone extension in another room of Sparks' home. The only issue before this Court was whether there had been an unauthorized interception within the meaning of Section 605 of the Federal Communications Act. This Court stated:

> "We hold that Section 605 was not violated in the case before us because there has been no 'interception' as Congress intended that the word be used."

In determining what constitutes an illegal wire tap, this Court's pronouncement in *Goldman* v. *United States* (1942), 316 U.S. 129, 86 L.Ed. 1322, 62 S.Ct. 993, is helpful. There the defendant contended that improper evidence obtained in violation of the Federal Communications Act had been admitted during his trial. It appeared that federal agents had obtained access to an office adjoining the defendant's office, and had by means of a detectaphone overheard conversations between the defendant and others, and had also overheard what defendant said while speaking into the office telephone. This Court held that the divulgence of what defendant had said into the telephone receiver did not constitute an "interception" within the meaning of the Federal Communications Act, since that statute protected the message itself throughout the course of its transmission, and words spoken in a room in the presence of another into a telephone receiver did not constitute a "wire communication" within the meaning of the statute. This Court said that the term "intercept" indicated the taking or seizing by the way

or before arrival at the destined place, and that it did not ordinarily connote the obtaining of what was to be sent before, or at the moment, it left the possession of the proposed sender; or after, *or at the moment, it came into the possession of the intended receiver.* And so it is in the case *sub judice* that the state officers listening in on a party line conversation on a telephone installed in premises rented by them obtained the information *at the moment it came into the possession of the intended receiver.* We note that the *Goldman* and *Rathbun* cases were cited with approval by this Court in the case of *Lopez* v. *United States,* 373 U.S. 427, 10 L.Ed. 2d 462, 83 S.Ct. 1381.

We believe the *Goldman* decision to be authority for the proposition that a trespass, either of an eavesdropper or an eavesdropping device is necessary to constitute a violation of the Fourth Amendment to the United States Constitution. E.g., *United States* v. *Pardo-Bolland,* 348 F.2d 316 (C.A. 2), certiorari denied, 382 U.S. 944; *Anspach* v. *United States,* 305 F.2d 48 (C.A. 10), certiorari denied, 371 U.S. 826; *Jones* v. *United States,* 339 F.2d 419 (C.A. 5), certiorari denied, 381 U.S. 915. We recognize, however, that the *Goldman* decision has been criticized as not providing an adequate means of dealing with problems arising from the use of electronic equipment such as the "parabolic microphone which can pick up a conversation 300 yards away," *Silverman* v. *United States,* 365 U.S. 505, 5 L.Ed. 2d 734, 81 S.Ct. 679; *Lopez* v. *United States,* 373 U.S. 427, 468 n. 16 (Brennan, J., dissenting), and that the Court may, therefore, wish to reconsider the validity of the *Goldman* decision. But assuming that *Goldman* should be modified where electronic surveillance is used to overhear conversations taking place within a "constitutionally protected area" see, e.g., *Silverman* v. *United States,* 365 U.S. 505, 510, we question whether a telephone party line (petitioners having knowledge of this fact) is a "constitutionally protected area."

The rights of privacy reflected in the guarantees of the Fourth Amendment must be measured in terms of the reasonable expectations of a person in a given location that he is free from scrutiny. Thus a field and a public street are normally not places where a man may legitimately anticipate that he will not be observed. *Hester* v. *United States*, 265 U.S. 57, 59; see *Lopez* v. *United States*, 373 U.S. 427, 466 n. 12 (Brennan, J., dissenting). Thus, measured in terms of reasonable expectations, we submit that a telephone party line is not significantly different.

Although questions as to whether the use of telephone instruments or other telephone equipment to overhear private conversations amounts to an invasion of privacy usually arise in connection with the use of wire taps, that is, mechanical devices physically attached to telephone wires, the problem can arise in relation to the use of telephone extension, or other telephonic equipment which does not involve actual wire tapping. There is little authority on the question whether use of telephonic equipment, apart from wire tapping, can support a claimed invasion of privacy. What authority there is tends to answer the question negatively. *Schmukler* v. *Ohio-Bell Tel. Co.*, (1953 CP) 66 Ohio L Abs 213, 116 NE 2d 819; *La Crone* v. *Ohio Bell Tel. Co.* (1961), 114 Ohio App. 299, 19 Ohio Ops 2d 236, 182 N.E. 2d 15.

We think the case of *Williams* v. *State*, 109 So.2d 379, to be persuasive. In *Williams*, a room was rented from the appellant next to his juke joint. The rental was made on behalf of the Sheriff, but appellant was told that some colored people were to be put in. Appellant had no knowledge that law enforcement officers were in any way connected with the rental. Appellant's telephone in his building was on a party line, which was the only line maintained by the telephone company in that

area. A telephone was installed in the rented premises by the telephone company, which was, by necessity, on the same party line as that of appellant. The evidence showed that the appellant was aware of this installation. Through the use of this party line telephone, a deputy sheriff overheard and recorded the conversations which appellant contends were erroneously admitted in evidence. On appeal, the Florida District Court of Appeal, Second District, held that Section 605 of the Federal Communications Act was not applicable to proceedings in state courts, citing *Schwartz* v. *Texas,* supra, as authority. And it is interesting to note that this point was conceded by appellant in his reply brief. Appellant also contended that the admission in evidence of the conversations in question was prohibited by Section 822.10, Florida Statutes, 1967. In answering this contention, the court had this to say:

> ". . . It must be kept in mind that the telephone installation used by the witnesses, whose testimony is sought to be excluded, was made by the telephone company in the regular course of business. Certainly it cannot be argued that a subscriber to service on a party line is the owner of the line, and that any one else seeking like service must first secure his permission before being entitled to a telephone. In breaking the Statute down to specific points, we find that it provides punishment to 'whoever, without the consent of the owner thereof * * * connects, directly or indirectly, by wire or any other means whatsoever, to or with any * * * telephone line so as to hear, or be in a position to hear, *or to enable any other person to hear or be in a position to hear,* for any use or purpose whatsoever * * *.' If the appellant were the owner of the party line, as he contends, then the telephone company itself violated the law by installing another phone without his consent. In other words, a subscriber on a party line would

be able to block any additional phone installations thereon by withholding his consent. We do not think any further discussion of this contention is necessary. Appellant was not the owner of the party line, and the quoted Statute has no application in the present case . . ." (Emphasis theirs)

We believe, as this Court said in *Rathbun*, that the purpose of the Federal Communications Act was to protect the privacy of telephone conversations against interference with the *means* of communication, but that the statute defined no duties of the communicants to each other in relation to messages received by wire, and that there was no prohibition against the disclosure of a message by either party to the conversation and no proscription against the disclosure of a conversation by a third party who had listened to it through regular channels of reception with the permission of the recipient of the message. The protection intended and afforded by said statute is of the *means of communication and not the secrecy of the communication.* This Court pointed out that telephone conversations had not been raised to the status of privileged communications as that doctrine was recognized in the law of evidence.

Although *Rathbun* v. *United States*, supra, involved the admissibility in evidence of the contents of a communication overheard on a regularly used telephone extension with the consent of one party to the conversation, we direct this Court's attention to the following language which closes the opinion:

"Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no

violation of any privacy of which the parties may complain."

We believe the corollary to be inescapable that one who knowingly uses a party line telephone is put upon notice that his conversation is likely to be overheard. It is of no consequence that petitioner Lee had ordered a private line, because the record clearly reflects that he was on notice that a party line had been installed at the residence. We urge, therefore, that the police officers in the instant case did nothing more than what they had a right to do.

So it is then that under the pronouncements of this Court there was no "interception" within the meaning of the Federal Communications Act, no trespass, no invasion of privacy and no violation of any state law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Florida to the Honorable Edward R. Kirkland, of Kirkland, Johnson & Blalock, Suite 104, 22 W. Lake Beauty Drive, Orlando, Florida, attorney for petitioners, by mail, this ..... day of November, 1967.

WALLACE E. ALLBRITTON
Assistant Attorney General

Of Counsel for the Respondent.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967
TUESDAY, JANUARY 31, 1967

CLYDE FRANKLIN LEE, ET AL.,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 35,888

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Fourth District of Florida, in said cause bearing date September 21, 1966, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

cc: Honorable Thomas Thatcher
Honorable Charles E. Limpus
Messrs. Kirkland, Johnson & Blalock
Honorable William D. Roth

Exhibit A

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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 174

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT, *Petitioners,*

—vs—

STATE OF FLORIDA, *Respondent.*

BRIEF OF PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 174

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN and CECIL ST. CLAIR MERRITT, *Petitioners,*

—vs—

STATE OF FLORIDA, *Respondent.*

BRIEF OF PETITIONERS

PRELIMINARY STATEMENT

All references to the Appendix will be made by the use of the prefix "A" and the page number in the appendix and the page number of the original transcript of testimony immediately following.

STATEMENT OF THE CASE

The Petitioners were tried and convicted in the Criminal Court of Record, in and for Orange County, Florida. At the trial, the following testimony was adduced.

The Police Officers of the Orange County Sheriff's Department in the City of Orlando, Florida, arranged to use a house

at 221 Manor Road, (A 39-42; 697, 698 and 699) adjacent to the house of the Petitioner, Clyde Lee, who resided at 411 Manor Road. Thereafter Police arranged with the telephone company to install a telephone there on the party line of the Petitioner, Clyde Lee, (A 26-29; 578 & 589). The Police paid for this installation. (A 1-2; 319).

The purpose for this installation is conceded by Detective Bobby Tanner of the Orange County Sheriff's Department to eavesdrop, or to search for evidence. (A 2-4; 323 & 324) Officer Francis Merrick testified that after the phone was installed at the house on 221 Manor Road, he placed a tape recorder and automatic actuator on the telephone by loosening two screws on the wall outlet and attaching the wires thereto. To this apparatus, earphones were attached that enabled them to eavesdrop or to overhear the conversation of the petitioners (A 29-33; 600, 605) without the necessity of having to lift the receiver. (A 37-38; 660) No one informed Petitioners, Lee, Brecheen or Merritt of the eavesdropping by the Police. (A 36, 37; 654).

Officer Merrick also testified that no permission was received from the sender to intercept their telephone conversations (A 38, 39; 664, 665), nor was any search warrant ever applied for by the police to conduct this electronic surveillance. Each time petitioner, Lee, made a telephone call, the conversations were taped and subsequently played audibly before the jury and admitted into evidence. Each time the Petitioner, Brecheen made an incoming call to Lee, the conversations were recorded and the tapes admitted into evidence. (A 44 & 45; 1050 & 1051) The same holds true for the Petitioner, Merritt, each time he made an incoming call. (A 42-44; 756, 757).

The incriminating evidence of these conversations was explained by the testimony of Lieutenant James Goode by virtue

of certain hypothetical questions propounded to him by the Solicitor. (A 45-63; 1535-1544) Tapes of these conversations were subsequently admitted into evidence, after they had been played audibly for the jury. (A 53, 54; 1589, 1590) Timely objections were made to the introduction of this evidence throughout the trial (A 33-36; 639) and (A 54-55; 1591).

Other tapes of other conversations either outgoing from Lee to Brecheen or Merritt, or incoming from the latter two to Lee's phone, that occurred 4 or 5 days prior to the search on August 10, 1963, were played audibly before the jury and admitted into evidence, but these were not included in the appendix since their only value is cumulative. These other tapes were played before the jury each time Officer Merrick or Officer Horner testified. With these conversations as a basis, the police obtained a search warrant (A 55-62) and executed it on August 10, 1963, at 411 Manor Road. (A 1; 279).

QUESTIONS PRESENTED

Point I

WHETHER EVIDENCE OF TAPE RECORDINGS OF CONVERSATIONS ON A PARTY LINE INTERCEPTED BY THE POLICE ON THE SAME PARTY LINE WITHOUT THE KNOWLEDGE OR CONSENT OF THE SENDER IS ADMISSIBLE IN A STATE COURT ON THE AUTHORITY OF 47 U.S.C., SECTION 605, OF THE FEDERAL COMMUNICATIONS ACT.

Point II

WHETHER EVIDENCE OF TAPE RECORDINGS OF CONVERSATIONS ON A PARTY LINE CONSTI-

TUTES AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

ARGUMENT

Point I

WHETHER EVIDENCE OF TAPE RECORDINGS OF CONVERSATIONS ON A PARTY LINE INTERCEPTED BY THE POLICE ON THE SAME PARTY LINE WITHOUT THE KNOWLEDGE OR CONSENT OF THE SENDER IS ADMISSIBLE IN A STATE COURT ON THE AUTHORITY OF 47 U.S.C., SECTION 605, OF THE FEDERAL COMMUNICATIONS ACT.

It is abundantly clear from the Transcript of Testimony as set forth in the above statement of the case that no one informed the Petitioners of the electronic surveillance of the Petitioners through the party line outlet of the home occupied by the police at 221 Manor Road; and no permission was received by any of the police officers to intercept the petitioners' telephone conversations.

In view of the recent decisions of this Court, the real question raised by the issue is whether or not this Court should overrule *Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232.*

The scope of the Federal Communications Act is fully set forth in this Court's decision in *Benanti v. United States,* 355 U.S. 96, 2 L. ed. 2d, 126, 78 S. Ct. 155 (1957), wherein Chief Justice Warren stated:

"The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under §605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. (citing *Weiss v. United States*, 308 U.S. 321, 84 L. ed. 298, 60 S. Ct. 269). The natural result of respondent's argument is that both interstate and intrastate communication would be removed from the statute's protection because, as this Court noted in *Weiss*, the interceptor cannot discern between the two and will listen to both. Congress did not intend to place the protections so plainly guaranteed in §605 in such a vulnerable position."

After considering other grants of authority delegated to the state under Title 47 U.S.C., the Court went on to say:

"Moreover, the very existence of these grants of authority to the States underscores the conclusion that *had Congress intended to allow the States to make exceptions to §605 it would have said so* (Emphasis supplied). In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying §605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

The basic premises of the Petitioners' argument with respect to both questions presented is that the police were mere intruders when they arranged with the telephone company to set up the party line on the same party line as the Petitioner, Lee. This is the important distinction in the case sub judice and the

case of *Rathbun v. United States*, 355 U.S. 107, 2 L. ed. 2n 134, 78 S. Ct., 161.

In the *Rathbun* case the police, with the consent of the person threatened, listened to their telephone conversation over a telephone extension. The Court held there that the contents of a communication over heard on a regularly used telephone extension, with the consent of one party to the conversation, are admissable in Federal Court and not violative of §605 of the Federal Communications Act. Inasmuch as the police must be considered under these facts as nothing more than intruders, it is clear from the above statement of the case that the police attached their apparatus for no other purpose than to intercept telephone conversations.

In the recent case of *United States v. Paska*, 332 F, 2d 193 (1964), the Seventh Circuit Court of Appeals stated:

> ". . . interception connotes a situation in which by surreptitious means a third party overhears a telephone conversation between two persons . . ."

In an earlier case Judge Learned Hand stated in *United States v. Polakoff*, 112 F, 2d 888 (2nd Cir. 1940) as follows:

> "The statute (§605, 47 U.S.C.A.) does not speak of physical interruption of the circuit, of or 'taps,' *it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts,*" (Emphasis supplied)

Another very recent case applying the same disdain for the technical niceties is *United States v. Laughlin*, 1963, 223 F. Supp. 623, which held that recordings obtained through the use

of an induction coil with the consent of one of the parties were not admissible. In a very forceful opinion, it was said:

> "To interpret the Federal Communications Act as meaning that a third party who can record a whole conversation on tape is not an *interception* does not, in my opinion, make sense for it is destructive of personal liberty. All this highly technical language to the effect that a mechanical device or an electronic device or an induction coil not directly attached to a telephone or a telephone line, but that is capable of recording a whole conversation between the parties, is not an '*interception*' is sheer nonsense. *The Courts should meet the issue squarely and should not attempt to make technical distinctions between the mechanical methods used.* What difference does it make whether a tapped wire records a conversation and an induction coil or other mechanical device does the same thing? *To say that there is a difference is a sham and an illusion,* * * * It follows therefore, that *where a conversation is recorded, regardless of the methods or the means used, without the consent of one of the parties,* the right of privacy has been violated." (Emphasis added)

It is therefore the contention of the Petitioners that if §605 represents a comprehensive scheme of interstate and intrastate regulations, then if the underlying policy of §605 cannot be thwarted by a State legislature, petitioners submit that a State rule of evidence in a State Court should be no more controlling.

Point II

WHETHER EVIDENCE OF TAPE RECORDINGS OF CONVERSATIONS ON A PARTY LINE CONSTI-

TUTES AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Upon this issue we begin with the premise that evidence obtained in violation of the Fourth Amendment of the United States Constitution is enforceable against the states through the due process clause of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684. As the facts above reveal, the police admitted that the only purpose for the eavesdropping was for no other reason than to search for evidence.

Deputy Tanner testified that the electronic surveillance was not conducted "for the fun of it" (A 3; 324). The basic support for the argument of the petitioners on this issue is *Katz v. United States*, 19 L. ed. 2d 576 decided by this Court some few months ago. In that case the F.B.I. agents attached an electronic listening and recording device to the outside of a public telephone booth and recorded the conversation of the petitioners which was later introduced into evidence to obtain his conviction. These facts represent a great similarity to facts of the case, sub judice. Here as in *Katz*, the police could have obtained a search warrant from a "neutral magistrate" to conduct the electronic surveillance. But here, as in *Katz*, the police more or less clothed themselves as the final arbiters of probable cause to search for evidence. This Court held in *Katz* that the "Fourth Amendment protects people not places," and the "Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve

that end did not happen to penetrate the wall of the booth can have no constitutional significance."

Mr. Justice Brennan said in his dissenting opinion in *Lopez v. United States*, 373 U.S. 427, 10 L. ed. 2d 467, 83 S. Ct. 1381:

> "The requirements of the Fourth Amendment are not technical or unreasonably stringent; they are the bedrock rules without which there would be no effective protection of the right to personal liberty. A search for mere evidence offends the fundamental principle against self-incrimination, as Lord Camden clearly recognized; a merely exploratory search revives the evils of the general warrant so bitterly opposed by the American Revolutionaries; and without some form of notice, police searches became intolerable intrusions into the privacy of home or office. Electronic searches cannot be tolerated in the name of law enforcement if they are inherently unconstitutional."

It can not be said that when the Petitioner, Lee ordered a private line and was given a party line, by arrangement, that he knowingly exposed himself to the intrusion of the police and the consequent eavesdropping, by the use of highly sophisticated electronic equipment. Nor, can it be said that Brechem and Merritt when they made incoming calls to the Petitioner, Lee, exposed themselves to eavesdropping for the same reasons.

As the Court said in *Katz*, ". . . What he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." The important thing here is that the police could have presented their case to a neutral magistrate and obtained a search warrant to conduct an electronic surveil-

lance, depending upon the affidavit that meets the requirements of the Fourth Amendment.

On the question of consent, this Court said in *Katz*, ". . . the very nature of electronic surveillance precludes it's use pursuant to the suspect's consent."

In the case, sub judice, we have nothing more than the indiscriminate use of electronic surveillance without the requisite antecedent judicial authorization. (See *Osborn v. United States*, 385 U.S. 323, 17 L. ed. 2d, 394, 87 S. Ct. 427, cases cited in footnote 9.)

The Court said in *Katz:*

> ". . . by passing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.' citing *Beck v. Ohio*, 379 U.S. 89, 96, 13 L. ed. 2d 142, 147, 85 S. Ct. 223."

The instant case also represents another forceful similarity to the case of *Silverman v. United States*, 365 U.S. 505, 5 L. ed. 2d 734, 81 S. Ct. 679. There this Court cited with apparent approval the facts and inferences from the dissenting opinion of Judge Washington of the Court of Appeals 275 F. 2d 173, 179.

> "Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants."

In the instant case, once the police arranged with the Winter Park Telephone Company to install the party line at 221 Manor Road and render it active, this line became the "duct" to which the police attached their automatic actuator and recorder. This announced similarity of facts is significant to the extent that this Court announced in the *Katz* case that:

> "The underpinings of Olmstead and Goldman have been so erroded by our subsequent decisions that the 'trespass' doctrine there enumerated can no longer be controlling."

Therefore, the considerations (of antecedent judicial authorization) when the search here is directed at the home should not vanish. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures," *Katz*, supra.

CONCLUSION

Inasmuch as this Court held in *Schwartz v. Texas* 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, that evidence received in Court in violation of §605 is applicable only to federal courts, petitioners respectfully request this Court to overrule *Schwartz v. Texas*, and hold that evidence obtained over a party line without the knowledge or consent of the sender is inadmissible in a State Court proceedings.

On the authority of the *Katz* case, petitioners respectfully submit that the judgments of convictions must be reversed.

Respectfully submitted,

EDWARD R. KIRKLAND
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished to Hon. Wallace Allbritton, Assistant Attorney General of Florida, Capitol Square, Tallahassee, Florida, by mail this ..... day of ....., 1968.

Edward R. Kirkland, Of
KIRKLAND, JOHNSON & BLALOCK
Suite 104, 22 W. Lake Beauty Dr.
Orlando, Florida
Attorney for Petitioners

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SUPREME COURT, U. S.

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MAR 25 1968
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No. 174

IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN AND CECIL ST. CLAIR MERRITT, PETITIONERS,

v.

STATE OF FLORIDA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, STATE OF FLORIDA

BRIEF FOR THE RESPONDENT

EARL FAIRCLOTH,
Attorney General,
State of Florida,

WALLACE E. ALBRITTON,
Assistant Attorney General,
State of Florida,

Attorneys,
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Tallahassee, Florida 32304

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

No. 174

CLYDE FRANKLIN LEE, GLEN DULEN BRECHEEN AND CECIL ST. CLAIR MERRITT, PETITIONERS,

v.

STATE OF FLORIDA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, STATE OF FLORIDA

BRIEF FOR THE RESPONDENT

PRELIMINARY STATEMENT

All references to the Appendix will be made by the use of the prefix "A" and the page number in the Appendix and the page number of the original transcript of testimony immediately following.

OPINION BELOW

The order of the Supreme Court of Florida denying petition for writ of certiorari dated January 31, 1967 is attached hereto as Exhibit A. Petition for rehearing in the same court was denied on February 23, 1967. The opinion of the District Court of Appeal, Fourth District of Florida, which petitioners sought to have the Supreme Court of Florida review on certiorari is reported at 191 So. 2d 84.

JURISDICTION

The judgment of the District Court of Appeal, Fourth District of Florida, was entered on September 21, 1966. Rehearing denied November 10, 1966. The order of the Supreme Court of Florida denying petition for writ of certiorari was entered January 31, 1967. Rehearing denied February 23, 1967. The petition for writ of certiorari was filed in this Court on May 19, 1967, and respondent was directed to file a response thereto by letter dated October 10, 1967. Petition for writ of certiorari was granted January 15, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

We believe that the question to be determined by this Court is properly stated as follows:

WHETHER THE ADMISSION IN EVIDENCE OF TAPE RECORDINGS OF TELEPHONE CONVERSATIONS ON A PARTY LINE VIOLATED PETITIONERS' RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT

The factual situation out of which these proceedings arose as reflected by the testimony adduced at the trial can be briefly outlined. Donald Brown, an installer-repairman for the Winter Park Telephone Company, testified that he installed the telephone at the residence located at 221 Manor Road which the police used (A 11, 12; 553). Brown related there was no special action taken with regard to the hooking up of the telephone (A 12-24; 554-566). The telephone was on a four-party line and Brown testified that there was no recording device hooked

to the telephone when he installed it (A 24; 569). It will be noted that this telephone was installed on July 26, 1963.

The telephone which was installed on July 19, 1963 at the house located at 411 Manor Road, which was occupied by the petitioners was put in by one James D. Wheaton, who was an installer-repairman for the Winter Park Telephone Company. When Wheaton installed the telephone, he informed a person he later identified at the trial as petitioner Lee, that he was installing an R-4 (four-party line) instead of an R-1 (private line) (A 5-6; 542). Wheaton's testimony revealed that the installation of the party line was done in a routine manner (A 4-5; 541). Mr. Wheaton testified unequivocally that he informed Lee that the only line available was an R-4, or four-party line (A 6-11; 544-549), and there was no contradictory testimony from petitioners.

Mr. Martin Nold, assignment supervisor for the Winter Park Telephone Company, testified that the telephones located at the residence of the petitioners and at the house rented by the police were both on the same party line (A 25; 575). Nold testified that there were no private lines available in the area (A 25-26; 577). Nold testified that he received verbal orders to try to put the telephone at 221 Manor Road (occupied by the police) on the same line with the telephone in the house which was occupied by the petitioners (A 26-27; 578). Nold said, however, that it was coincidental that the telephone requested by the police was placed on the same party line with petitioners (A 27-28; 584).

SUMMARY OF ARGUMENT

A. The Federal Communications Act (47 U.S.C., Section 605) is not applicable to proceedings in state courts. *Schwartz v. Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232.

B. The action of the state officers in listening in on a party line telephone conversation does not constitute an *interception* within the meaning and intendment of Section 605 of the Federal Communications Act. *Rathbun v. United States*, 355 U.S. 107, 2 L.Ed. 2d 134, 78 S.Ct. 161.

C. The state officers committed no trespass. There was no electronic surveillance to overhear conversations taking place within a "constitutionally protected area" see, e.g., *Silverman v. United States*, 365 U.S. 505, 510. The state officers did nothing more than what they had a right to do by picking up the receiver of a telephone installed at the premises rented by them and listening to a party line telephone conversation.

D. The dictates of common sense compel the conclusion that a telephone party line is not a "constitutionally protected area." Petitioners, by choosing to place calls from a party line telephone ran the risk that their words might be overheard by somone whose telephone was connected to the same party line. We say there is little, if any, basis for even suggesting that the degree of privacy which petitioners could reasonably expect to enjoy in a party line telephone conversation was comparable to that which they could expect (and demand) on a private line. See *Smayda v. United States*, 353 F.2d 251, 254-256 (C.A. 9) certiorari denied 382 U.S. 981.

E. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. A person using a party line telephone does not have a constitutionally protected reasonable expectation of privacy.

ARGUMENT

WHETHER THE ADMISSION IN EVIDENCE OF TAPE RECORDINGS OF TELEPHONE CONVER-

SATIONS ON A PARTY LINE VIOLATED PETITIONERS' RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The law of wire tapping in Florida was most thoroughly and clearly set forth in the opinion of the Florida District Court of Appeal, First District, in the case of *Griffith v. State*, Fla. App. 1959, 111 So.2d 282, which was later followed and re-affirmed in *Barber v. State*, Fla. App. 1965, 172 So.2d 857. The Florida Supreme Court denied certiorari in both of these cases.

In the *Griffith* case, supra, it was pointed out that although there were no state or federal statutes applicable in Florida which would make wire tapping illegal, that wire tapping is illegal in Florida because it violates Sections 12 and 22 of the Declaration of Rights of the Florida Constitution, which provide:

> "Section 12 . . . No person shall be . . . compelled in any criminal case to be a witness against himself. . . "

> "Section 22 . . . The right of the people to be secure in their persons, house, papers and effects against unreasonable seizures and searches, shall not be violated . . ."

Certainly the holding in the *Griffith* case, supra, that there was no federal statute applicable in Florida which would make wire tapping illegal is in harmony with previous pronouncements of this Court. We refer particularly to the holding of this Court in *Schwartz v. Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232. There the petitioner contended that Section 605 of the Federal Communications Act, (47 U.S.C. Section 605) rendered inadmissible in evidence the records of intercepted telephone conversations without petitioner's consent. The Court recognized that it was dealing only with the application of a federal statute to state proceedings and held as follows:

"We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings . . ."

We believe that this Court's holding as above set forth is controlling and, therefore, obviates the necessity of determining whether or not there was an "interception" within the meaning of Section 605 of the Federal Communications Act.

Petitioners seem to be of the opinion that this Court's decision in *Benanti v. United States*, 355 U.S. 96, 2 L.Ed. 2d 126, 78 S.Ct. 155, supports their contention that the Federal Communications Act (47 U.S.C. Section 605) is applicable to state court proceedings. We do not so read the case. In *Benanti*, this Court simply held that information obtained and divulged by state agents in violation of Section 605 of the Federal Communications Act is inadmissible in a federal court. Obviously, this Court had to first determine whether or not there had been a violation of the Act before being able to rule on the admissibility of the information sought to be introduced in evidence in federal court. We cannot understand how this holding can be construed as making the Federal Communications Act applicable to state court proceedings.

But should this Court seek to determine whether the state agents violated Section 605 of the Federal Communications Act in the case *sub judice*, the case of *Rathbun v. United States*, 355 U.S. 107, 2 L.Ed. 2d 134, 78 S.Ct. 161, is informative. In *Rathbun*, the petitioner telephoned one Sparks in the early morning hours and two police officers at Sparks' direction listened to the conversation over a telephone extension in another room of Sparks' home. The only issue before this Court was whether there had been an unauthorized interception within the meaning

of Section 605 of the Federal Communications Act. This Court stated:

> "We hold that Section 605 was not violated in the case before us because there has been no 'interception' as Congress intended that the word be used."

In determining what constitutes an illegal wire tap, this Court's pronouncement in *Goldman v. United States* (1942), 316 U.S. 129, 86 L.Ed. 1322, 62 S.Ct. 993, is helpful. There the defendant contended that improper evidence obtained in violation of the Federal Communications Act had been admitted during his trial. It appeared that federal agents had obtained access to an office adjoining the defendant's office, and had by means of a detectaphone overheard conversations between the defendant and others, and had also overheard what defendant said while speaking into the office telephone. This Court held that the divulgence of what defendant had said into the telephone receiver did not constitute an "interception" within the meaning of the Federal Communications Act, since that statute protected the message itself throughout the course of its transmission, and words spoken in a room in the presence of another into a telephone receiver did not constitute a "wire communication" within the meaning of the statute. This Court said that the term "intercept" indicated the taking or seizing by the way or before arrival at the destined place, and that it did not ordinarily connote the obtaining of what was to be sent before, or at the moment, it left the possession of the proposed sender; or after, *or at the moment, it came into the possession of the intended receiver.* And so it is in the case *sub judice* that the state officers listening in on a party line conversation on a telephone installed in premises rented by them obtained the information *at the moment it came into the possession of the intended receiver.*

We recognize that this Court in *Katz v. United States*, ... U.S. ....., 19 L.Ed. 2d 576; 88 S.Ct. ....., decided December 18, 1967, overruled both *Olmstead v. United States*, 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564 and *Goldman v. United States*, supra, at least to the extent that those cases are no longer authority for the proposition that a conversation is not subject to Fourth Amendment protections where it was overheard by means not involving a physical trespass on constitutionally protected premises.

We believe that the rights of privacy reflected in the guarantees of the Fourth Amendment must be measured in terms of the reasonable expectations of a person in a given location that he is free from scrutiny. Thus a field and a public street are normally not places where a man may legitimately anticipate that he will not be observed. *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898, 44 S.Ct. 445; *Lopez v. United States*, 373 U.S. 427, 464, 10 L.Ed. 2d 462, 484, 83, S.Ct 1381 (p. 466, n. 12, Brennan J., dissenting). We urge that when measured in terms of reasonable expectations, a telephone party line is not significantly different.

Although questions as to whether the use of telephone instruments or other telephone equipment to overhear private conversations amounts to an invasion of privacy usually arise in connection with the use of wire taps, that is, mechanical devices physically attached to telephone wires, the problem can arise in relation to the use of telephone extension, or other telephonic equipment which does not involve actual wire tapping. There is little authority on the question whether use of telephonic equipment, apart from wire tapping, can support a claimed invasion of privacy. What authority there is tends to answer the question negatively. *Schmukler v. Ohio-Bell Tel. Co.*, (1953 CP) 66 Ohio L Abs 213, 116 NE, 2d 819; *LaCrone v. Ohio Bell Tel.*

Co. (1961), 114 Ohio App. 299, 19 Ohio Ops 2d 236, 182 N.E. 2d 15.

We think the case of *Williams v. State*, 109 So. 2d 379, to be persuasive. In *Williams*, a room was rented from the appellant next to his juke joint. The rental was made on behalf of the Sheriff, but appellant was told that some colored people were to be put in. Appellant had no knowledge that law enforcement officers were in any way connected with the rental. Appellant's telephone in his building was on a party line, which was the only line maintained by the telephone company in that area. A telephone was installed in the rented premises by the telephone company, which was, by necessity, on the same party line as that of appellant. The evidence showed that the appellant was aware of this installation. Through the use of this party line telephone, a deputy sheriff overheard and recorded the conversations which appellant contends were erroneously admitted in evidence. On appeal, the Florida District Court of Appeal, Second District, held that Section 605 of the Federal Communications Act was not applicable to proceedings in state courts, citing *Schwartz v. Texas*, supra, as authority. And it is interesting to note that this point was conceded by appellant in his reply brief. Appellant also contended that the admission in evidence of the conversations in question was prohibited by Section 822.10, *Florida Statutes*, 1967. In answering this contention the court had this to say:

> ". . . It must be kept in mind that the telephone installation used by the witnesses, whose testimony is sought to be excluded, was made by the telephone company in the regular course of business. Certainly it cannot be argued that a subscriber to service on a party line is the owner of the line, and that any one else seeking like service must first secure his permission before being entitled to a telephone.

In breaking the Statute down to specific points, we find that it provides punishment to 'whoever, without the consent of the owner thereof * * * connects, directly or indirectly, by wire or any other means whatsoever, to or with any * * * telephone line so as to hear, or be in a position to hear, *or to enable any other person to hear or be in a position to hear*, for any use or purpose whatsoever * * *.' If the appellant were the owner of the party line, as he contends, then the telephone company itself violated the law by installing another phone without his consent. In other words, a subscriber on a party line would be able to block any additional phone installations thereon by withholding his consent. We do not think any further discussion of this contention is necessary. Appellant was not the owner of the party line, and the quoted Statute has no application in the present case . . ." (Emphasis theirs)

We believe, as this Court said in *Rathbun*, that the purpose of the Federal Communications Act was to protect the privacy of telephone conversations against interference with the *means* of communication, but that the statute defined no duties of the communicants to each other in relation to messages received by wire, and that there was no prohibition against the disclosure of a message by either party to the conversation and no proscription against the disclosure of a conversation by a third party who had listened to it through regular channels of reception with the permission of the recipient of the message. The protection intended and afforded by said statute is of the *means of communication and not the secrecy of the communication.* This Court pointed out that telephone conversations had not been raised to the status of privileged communications as that doctrine was recognized in the law of evidence.

Although *Rathbun v. United States*, supra, involved the ad-

missibility in evidence of the contents of a communication overheard on a regularly used telephone extension with the consent of one party to the conversation, we direct this Court's attention to the following language which closes the opinion:

> "Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain."

We agree with petitioners' premise that evidence obtained in violation of the Fourth Amendment must be excluded in state courts. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684. However, we point out that petitioners' premise assumes an affirmative answer to the precise question to be decided by this Court. Although it was held in *Katz* that the "Fourth Amendment protects people not places," and the "Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he *justifiably relied while using the telephone booth* . . ." (Emphasis ours). But this is a far cry from saying or even intimating that a person who knowingly uses a party line is even reasonably justified in believing that his words will be heard only by the person for whom intended.

We repeat that this Court squarely held in *Rathbun* that each party to a telephone conversation takes the risk that the other party may allow a third person to listen in. When such takes place, there has been no violation of privacy of which the parties may complain. Then we believe the corollary to be

inescapable that one who *knowingly* uses a party line telephone is put upon notice that his conversation is likely to be overheard and when such takes place, we urge there has been no violation of any privacy of which the parties may complain. It is of no consequence that petitioner Lee had ordered a private line, because the record clearly reflects that he was on notice that a party line had been installed at the residence. We urge, therefore, that the police officers in the case *sub judice* did nothing more than what they had a right to do. When the telephone rang, the police officers lifted the receiver and listened in. This may not meet with the approval of Amy Vanderbilt, but there is no law, state or federal, prohibiting them from so doing.

We agree that wherever a man may be, he is entitled to know that he will remain free from *unreasonable* searches and seizures. But, we urge that there is nothing reasonable in petitioner's contention that he was justified in relying on a right of privacy when conducting an illegal gambling operation over what was known to him to be a party line telephone.

CONCLUSION

Respondent respectfully urges that this Court should vacate its previous order granting the petition for writ of certiorari and affirm the action of the court below.

Respectfully submitted,

.....

EARL FAIRCLOTH,
Attorney General,
State of Florida,

.....

WALLACE E. ALLBRITTON,
Assistant Attorney General,
State of Florida,

Attorneys.

PROOF OF SERVICE

I hereby certify that I have furnished a copy of the foregoing Brief for Respondent to Honorable Edward R. Kirkland, of Kirkland, Johnson & Blalock, Suite 104, 22 W. Lake Beauty Dr., Orlando, Florida, Attorney for Petitioners, by mail, this ..... day of March, 1968.

.....

WALLACE E. ALLBRITTON,
Assistant Attorney General,
State of Florida,
Of Counsel for Respondent.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A.D. 1967
THURSDAY, FEBRUARY 23, A.D. 1967

CLYDE FRANKLIN LEE, ET AL,
Petitioners
—vs.
STATE OF FLORIDA,
Respondent

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

SID J. WHITE
CLERK SUPREME COURT

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ORDER OF JANUARY 31, 1967, IN THE ABOVE CAUSE)

Exhibit A

SUPREME COURT OF THE UNITED STATES

No. 174.—October Term, 1967.

Clyde Franklin Lee et al., Petitioners, v. State of Florida. | On Writ of Certiorari to the District Court of Appeal of Florida, Fourth District.

[June 17, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

The three petitioners were convicted in a Florida trial court for violating the state lottery laws. Their convictions were affirmed by a Florida district court of appeal,[1] and the Supreme Court of Florida denied further review. We granted certiorari to consider the application of § 605 of the Federal Communications Act, 48 Stat. 1064, 1103, 47 U. S. C. § 605, to the circumstances of this case.[2] That statute provides:

> "[N]o person not being authorized by the sender shall intercept any communication and divulge . . . the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

In the summer of 1963 petitioner Lee ordered the installation of a private telephone in the house where he lived near Orlando, Florida. The local telephone company informed him that no private lines were available, and he was given a telephone on a four-party line instead. A week later, at the direction of the Orlando police de-

[1] *Lee* v. *State*, 191 So. 2d 84.

[2] 389 U. S. 1033. Issues under the Fourth and Fourteenth Amendments were also presented in the petition for certiorari. We do not reach those issues.

partment, the company connected a telephone in a neighboring house to the same party line.[3] The police attached to this telephone an automatic actuator, a tape recorder, and a set of earphones. The equipment was connected directly to the wall outlet in such a way that the police could hear and record all conversations on the party line without the necessity of lifting the receiver on their telephone. This arrangement not only afforded the police continuous access to all of Lee's outgoing and incoming calls, but also eliminated the telltale "click" that would otherwise have warned conversing parties that someone else on the line had picked up a receiver. Further, the arrangement insured that noises in the house occupied by the police would not be heard by anyone else on the line. For more than a week the police used this equipment to overhear and record telephone calls to and from Lee's residence, including calls made to Lee by the other two petitioners from private as well as public telephones.

At the petitioners' trial, several of these recordings were introduced in evidence by the prosecution over objection by defense counsel. In affirming the convictions, the state appellate court said that "there were no state or federal statutes applicable in Florida which would make wiretapping illegal and inadmissible in evidence . . . ."[4]

We disagree. There clearly *is* a federal statute, applicable in Florida and every other State, that made

[3] The record does not show how or why this house was made available to the Orlando police.

[4] 191 So. 2d, at 85. The court went on to say that "wiretapping is illegal in Florida" by reason of the Florida Constitution. However, the court found that what the police did in this case did not amount to "wiretapping" within the scope of the state constitutional prohibition. The court based its conclusions upon several previous Florida cases: *Perez* v. *State*, 81 So. 2d 201; *Williams* v. *State*, 109 So. 2d 379; *Griffith* v. *State*, 111 So. 2d 282; *Barber* v. *State*, 172 So. 2d 857.

illegal the conduct of the Orlando authorities in this case. And that statute, we hold today, also made the recordings of the petitioners' telephone conversations inadmissible as evidence in the Florida court.

I.

Section 605 of the Federal Communications Act speaks not in terms of tapping a wire, but in terms of intercepting and divulging a communication. The State concedes that the police "divulged" the petitioners' conversations within the meaning of the statute. But, it argues, the police cannot be deemed to have "intercepted" the telephone conversations, because people who use party lines should realize that their conversations might be overheard.

This is not a case, however, where the police merely picked up the receiver on an ordinary party line, and we need not decide whether § 605 would be applicable in those circumstances.[5] For here the police did much more. They deliberately arranged to have a telephone connected to Lee's line without his knowledge, and they altered that connection in such a way as to permit continuous surreptitious surveillance and recording of all conversations on the line. What was done here was a far cry from the police activity in *Rathbun* v. *United States*, 355 U. S. 107, a case heavily relied upon by the respondent. There we found no interception where "a communication [is] overheard on a regularly used tele-

[5] A party-line user's privacy is obviously vulnerable, but it does not necessarily follow that his telephone conversations are completely unprotected by § 605. In many areas of the country private telephone lines are not available; in other areas they are available only at higher rates than party lines. There is nothing in the language or history of § 605 to indicate that Congress meant to afford any less protection to those who, by virtue of geography or financial hardship, must use party-line telephones.

phone extension with the consent of one party to the conversation," *ibid.*, and where the "extension had not been installed there just for this purpose but was a regular connection, previously placed and normally used." *Id.*, at 108. We viewed that situation as though one of the parties to the telephone conversation had simply "held out his handset so that another could hear out of it." *Id.*, at 110–111. In the present case, by contrast, there was neither "the consent of one party" nor a "regularly used" telephone "not . . . installed . . . just for [the] purpose" of surveillance. The conduct of the Orlando police, deliberately planned and carried out, clearly amounted to interception of the petitioners' communications within the meaning of § 605 of the Federal Communications Act.[6]

II.

The remaining question is whether the recordings that the police obtained by intercepting the petitioners' telephone conversations were admissible in evidence in the Florida trial court, notwithstanding the express prohibition of federal law against divulgence of recordings so procured.

Section 605 was enacted as part of the Federal Communications Act of 1934, 48 Stat. 1064, 1103, six years after the Court had said in *Olmstead* v. *United States*, 277 U. S. 438, 465, that "Congress may of course [legislate to] protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence . . . ." In *Nardone* v. *United States*, 302 U. S. 379, the Court was first called upon to decide whether § 605 had indeed served to render evidence of intercepted communications inadmissible in a federal trial. In that

[6] Section 605 prohibits interception and divulgence of intrastate as well as interstate communications. *Weiss* v. *United States*, 308 U. S. 321.

case the Government urged that "a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime." 302 U. S., at 383. In reversing the judgment of conviction, the Court's answer to that argument was unequivocal:

> "[T]he plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that '*no person*' shall divulge or publish the message or its substance to '*any person.*' To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments.
>
> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution." 302 U. S., at 382, 383.

Fifteen years later, in *Schwartz* v. *Texas,* 344 U. S. 199, the Court considered the question whether, despite § 605, telephone communications 'intercepted' by state officers could lawfully be received in evidence in state criminal trials. That case was decided in the shadow of *Wolf* v. *Colorado,* 338 U. S. 25, which shortly before had held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid

the admission of evidence obtained by an unreasonable search and seizure." 338 U. S., at 33. The Court in *Schwartz* recognized that the problem before it was "somewhat different" from the one that had been presented in *Wolf*, "because the introduction of the intercepted communications would itself be a violation" of federal law. 344 U. S., at 201. But the Court nonetheless concluded that state trial courts were not required to reject evidence violative of § 605. For if, as *Wolf* had held, state courts were free to accept evidence obtained in violation of the Federal Constitution, the Court reasoned that they could not be required to reject evidence obtained and divulged in violation of a federal statute. That was the thrust of the *Schwartz* opinion:

> "Although the intercepted calls would be inadmissible in a federal court, it does not follow that such evidence is inadmissible in a state court. Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court, *Wolf* v. *Colorado*, 338 U. S. 25, while such evidence, if obtained by a federal officer, would be clearly inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383." *Ibid.*

The fact that a state official would be violating the express terms of the federal statute by the very act of divulging the intercepted communications as evidence for the prosecution at the trial, the Court in *Schwartz* said, was "simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts." *Ibid.* But in *Benanti* v. *United States*, 355 U. S. 96, five years later, the Court returned to the teaching of *Nardone* in giving emphatic recognition to the language of the statute that itself makes illegal the divulgence of intercepted communications. In *Benanti* the

Court held inadmissible in a federal trial communications that had been intercepted by state officers.[7] "Section 605," the Court said, "contains an express, absolute prohibition against the divulgence of intercepted communications." 355 U. S., at 102.

After the *Benanti* decision, therefore, the only remaining support for *Schwartz* v. *Texas, supra,* was the holding in *Wolf* v. *Colorado, supra,* that state courts, unlike federal courts, were free to decide for themselves whether to condone violations of federal law by accepting the products of such violations as evidence. That doctrinal underpinning of the *Schwartz* decision was, of course, completely removed by *Mapp* v. *Ohio,* 367 U. S. 643, which overruled *Wolf* and squarely held that evidence obtained by state officers in an unreasonable search is inadmissible in a state criminal trial.

In view of the *Nardone* and *Benanti* decisions,[8] the doctrine of *Schwartz* v. *Texas* cannot survive the demise of *Wolf* v. *Colorado, supra.* In the *Mapp* case, the Court in overruling *Wolf* imposed a judicially devised exclusionary rule in order to insure that a State could not adopt rules of evidence calculated to permit the invasion of rights protected by federal organic law. In the present case the federal law itself explicitly protects intercepted communications from divulgence, in a court or any other place.

But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the "imperative of judicial integrity." *Elkins*

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[7] It was not until two Terms later, in *Elkins* v. *United States,* 364 U. S. 206, that the Court repudiated the "silver platter doctrine," under which evidence obtained by state officers in violation of the Fourth and Fourteenth Amendments could be received as evidence in federal courts.

[8] See also the second *Nardone* case, *Nardone* v. *United States,* 308 U. S. 338.

v. *United States*, 364 U. S. 206, 222.[9] Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of "the Laws of the United States," laws by which "the Judges in every State [are] bound . . . ."[10]

Finally, our decision today is counseled by experience. The hope was expressed in *Schwartz* v. *Texas* that "[e]nforcement of the statutory prohibition in § 605 can be achieved under the penal provisions" of the Communications Act. 344 U. S., at 201.[11] That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of § 605 since the statute was enacted.[12] We con-

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[9] "[I]t cannot be lawful to authorize what is an illegal act. . . . [I]f the police officer violates the Federal statute by tapping wires notwithstanding a warrant issued out of this court pursuant to New York law—if that act be illegal—those who set the act in motion have condoned if not instigated illegality. . . . [T]he warrant itself partakes of the breach, willful or inadvertent, of the Federal law. Such breach may not find sanction in the orders of courts charged with the support of the law of the land and with enforcing that law!" *In re Telephone Communications*, 9 Misc. 2d 121, 126, 170 N. Y. S. 2d 84, 89 (N. Y. Sup. Ct.).

See also *Application for Interception of Telephone Communications*, 23 Misc. 2d 543, 198 N. Y. S. 2d 572 (N. Y. Ct. Gen. Sess.).

Compare Judge Waterman's concurring opinion in *Pugach* v. *Dollinger*, 277 F. 2d 739 (denying injunction against state officer for violating § 605), aff'd *per curiam*, 365 U. S. 458:

"It is therefore presumptious to assume that any New York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath." 277 F. 2d, at 745.

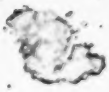
[10] "[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, U. S. Const.

[11] Compare *Wolf* v. *Colorado*, 338 U. S. 25, at 30–31.

[12] In *Pugach* v. *Klein*, 193 F. Supp. 630, a defendant in a state criminal case attempted unsuccessfully to initiate a criminal prosecu-

clude, as we concluded in *Elkins* and in *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law "in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U. S., at 217.

Reversed.



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tion against state officers for violations of § 605. See also *Simmons* v. *O'Connor*, 187 F. Supp. 702 (denying damages in action against state officer for violation of § 605).

There seem to be only two reported prosecutions of private individuals for violations of § 605. *United States* v. *Gruber*, 123 F. 2d 307; *United States* v. *Gris*, 247 F. 2d 860.

SUPREME COURT OF THE UNITED STATES

No. 174.—October Term, 1967.

Clyde Franklin Lee et al., Petitioners, v. State of Florida. | On Writ of Certiorari to the District Court of Appeal of Florida, Fourth District.

[June 17, 1968.]

Mr. Justice Black, dissenting.

In 1937, *Nardone* v. *United States*, 302 U. S. 379, held that 47 U. S. C. § 605 forbids the introduction of intercepted and divulged telephone conversations in federal courts. In *Schwartz* v. *Texas*, 344 U. S. 199 (1952), this Court held, however, that the section does not forbid the use of such evidence in state criminal trials, saying: "we do not believe that Congress intended to impose a rule of evidence on the state courts." 344 U. S., at 203. I thought the holding in *Schwartz* was correct then and still think so. The Court holds, however, that § 605 now compels state courts to exclude such intercepted telephone messages from state trials. The effect of this holding is to overrule *Schwartz* v. *Texas*. The Court's holding is made despite the fact that Congress itself has not changed the section. Nor does *Mapp* v. *Ohio*, 367 U. S. 643 (1961), undermine *Schwartz* as the Court intimates, for in *Schwartz* we dealt, as we do here, with conduct that violates only a federal statute and so deserves only the sanctions contemplated by that statute. The Communications Act explicitly provides for penal sanctions, 47 U. S. C. § 501, and some civil remedies might be implied as a matter of federal law, cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964). But the creation by statute of a federal substantive right does not mean that the States are required by the Supremacy Clause to give every pro-

cedural trial remedy afforded by federal courts or that failure to afford such remedies renders the State "an accomplice in the willful transgression of 'the Laws of the United States.'" *Ante*, p. 8.

I think it would be more appropriate for the Court to leave this job of rewriting § 605 to the Congress. Waiting for Congress to rewrite its law, however, is too slow for the Court in this day of the rapid creation of new judicial rules, many of which inevitably tend to make conviction of criminals more difficult. I cannot agree that there is the slightest justification for overruling *Schwartz* and would affirm these Florida gambling convictions.

SUPREME COURT OF THE UNITED STATES

No. 174.—October Term, 1967.

Clyde Franklin Lee et al., Petitioners, v. State of Florida. | On Writ of Certiorari to the District Court of Appeal of Florida, Fourth District.

[June 17, 1968.]

Mr. Justice Harlan, whom Mr. Justice White joins, dissenting.

Congress has ample power to proscribe any particular use of intercepted telephone conversations. The question here is simply whether § 605 of the Communications Act proscribes basing state criminal convictions on such interceptions. This statutory question does not involve any constitutional exclusionary rule, cf. *Mapp* v. *Ohio*, 367 U. S. 643, or the supervisory power of this Court over the lower federal courts, cf. *Weeks* v. *United States*, 232 U. S. 383.

More than 15 years ago, in *Schwartz* v. *Texas*, 344 U. S. 199, this Court decided that § 605 did not render state convictions based on such interceptions invalid. Although arguments can be made that this decision was incorrect, the matter is hardly without difficulty. It is not at all obvious that a statute which by its terms prohibits only interception and divulgence of conversations, meant also to prohibit state-court reliance on the perfectly probative evidence gained thereby.*

**Nardone* v. *United States*, 302 U. S. 379, established that divulgence of intercepted communications in court was a violation of § 605. The Court went on to hold that a federal conviction resulting from such a violation was itself improper. The Court did not, however, make it clear whether the Act required that result by its own force or the Court was simply imposing that result by virtue of its supervisory power.

It disserves the proper relation between this Court and Congress to change the long-standing interpretation of a federal statute in the absence of much more convincing evidence than is here adduced that the Court originally mistook what Congress intended. The importance of the principle of *stare decisis* of course varies with the nature of the question. It is at its highest in a case such as the present: Congress has considered the wiretapping problem many times, each time against what it naturally assumed to be a stable background of statute law. To vary that background with the inclinations of members of this Court is to frustrate orderly congressional consideration of statutory problems. I would therefore adhere to *Schwartz*.

Since the Court does not reach petitioner's further contention that the interception violated his constitutional rights, I am content to dissent from the Court's determination of the statutory question and not to express views that would, at this stage, be academic.